Supreme Court, U.S.
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No. 95-85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

REEBOK INTERNATIONAL LTD. and
REEBOK INTERNATIONAL LIMITED,

Petitioners,

– against –

BANQUE INTERNATIONALE A LUXEMBOURG S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HARLEY I. LEWIN
Counsel of Record
GAYLE ROXANNE ELINGS
LEWIN & LAYTIN, P.C.
Fifteenth Floor
1776 Broadway
New York, New York 10019
(212) 586-3490
Counsel for Petitioners

92pp

QUESTION PRESENTED

Whether a federal district court's inherent powers to enforce its injunctions reaches extraterritorially to prevent non-parties from committing acts outside the United States which aid and abet a party in violating the injunction.

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption. Pursuant to Rule 29.1, Petitioners make the following disclosures:

Petitioner, REEBOK INTERNATIONAL LTD., is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its principal place of business in Stoughton, Massachusetts; it has no parent companies and no subsidiaries or affiliates that have issued shares to the public.

Petitioner, REEBOK INTERNATIONAL LIMITED, is a wholly owned subsidiary of REEBOK INTERNATIONAL LTD. and is a limited company organized and existing under the laws of the United Kingdom, having its principal place of business in Oxbridge, Middlesex, England.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Reebok International Limited and Reebok International Ltd. (collectively "Reebok" or "Petitioner"), hereby petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") entered in this proceeding on March 6, 1995.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 42a-62a)[1] is reported at 49 F.3d 1387 (9th Cir. 1995). The Ninth Circuit order denying rehearing (App. 63a) is not reported. The opinion of the United States District Court for the Southern District of California ("District Court") denying contempt as against respondent, Banque Internationale a Luxembourg, S.A. ("BIL" or "Respondent") (App. 1a-17a) is not reported. The opinion of the District Court granting Reebok's motion for contempt against BIL upon reconsideration (App. 18a-33a) is reported at 827 F. Supp. 622, 28 U.S.P.Q.2d 1209 (S.D. Cal. 1993). The opinion of the District Court fixing the amount of sanctions (App. 34a-41a) is not reported.

JURISDICTION

The Ninth Circuit entered its decision on March 6, 1995. App. 42a-62a. Rehearing was denied on April 19, 1995. App. 63a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]All citations to "App. ____" refer to the Appendix filed contemporaneously herewith pursuant to the United States Supreme Court Rule 14(k). For a full recitation of the facts, this Court is respectfully referred to the Excerpts, Supplemental Excerpts of Records and the Court Record filed in the lower courts. All citations to "Supp. Ex. R. ___" refer to the Supplemental Excerpts of Record filed on December 27, 1993 in the Ninth Circuit. All citations to "CR ___" refer to the Southern District of California Court Record.

STATUTORY PROVISION INVOLVED

Fed. R. Civ. P. 65(d), which governs the process of injunctions and derives its authority from the common law doctrine of injunctive powers, provides in relevant part:

> Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

STATEMENT

Reebok instituted the underlying action, *Reebok International Ltd., et al. v. Byron McLaughlin, et al.* (Civil Action No. 89-1739-GT) ("the action"), under the Lanham Act, 15 U.S.C. §1051, *et seq.* (the "Lanham Act"), to stop the defendants' importation, distribution and sale of counterfeit REEBOK footwear in the United States and elsewhere throughout the world. App. 2a.

A. Statement of Facts

Reebok obtained an injunction restraining the assets of the defendants, including Byron McLaughlin ("McLaughlin") and Heatherdale Corp. ("Heatherdale")[2] (collectively "Defendants"), during the pendency of the action. The injunction was initially issued, *ex parte*, on November 27, 1989, and was continued for the duration of the action after a hearing on December 11, 1989. App. 2a.

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[2]Heatherdale was wholly owned and controlled by McLaughlin.

On November 29, 1989, the injunction was served by hand at BIL's New York office[3] and by facsimile upon BIL's Luxembourg office. App. 2a. BIL acknowledged receipt both orally and in writing. The order continuing the injunction was similarly served upon BIL at both its New York and Luxembourg offices. App. 2a.

Within days of having notice of the injunction and at McLaughlin's request, BIL transferred monies from accounts in the name of Heatherdale ("Heatherdale Accounts") through accounts in the name of Brigitte ("Brigitte Accounts") into accounts in the name of a Panamanian offshore corporation set up by BIL, Bawnmore Holdings, Inc. ("Bawnmore Accounts"). App. 19a, 26a-29a; Supp. Ex. R. 207-20, 249.[4]

As a result of the transfer, only nominal monies remained in the Heatherdale Accounts when Reebok instituted a series of proceedings in the Luxembourg courts to obtain an order attaching the Heatherdale Accounts. App. 3a. Reebok was denied relief because the injunction was not a title enforceable in Luxembourg and thus could not be executed in the sense of a final judgment for

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[3]BIL is a bank organized under the laws of Luxembourg with: (i) representative offices in Germany, Spain and the United States (New York); (ii) two major branches in Singapore and London; and (iii) subsidiaries in Singapore and Switzerland. BIL advertises in trade directories which are circulated throughout the United States, CR 192; and as early as April 1989, provided banking services to McLaughlin in California. App. 21a; Supp. Ex. R. 7-8.

[4]McLaughlin was incarcerated in California at the time of the transfers; however, he communicated with BIL's in-house attorney, Mr. Jean-Jacques Rommes ("Rommes"), and others, via telephone and McLaughlin's wife, Brigitte McLaughlin ("Brigitte"), who carried written instructions to BIL's Luxembourg office. App. 25a-26a; Supp. Ex. R. 207-20.

money.[5] Reebok then instituted summary proceedings against BIL seeking an order restraining monies in the Heatherdale Accounts. App. 3a-4a. Reebok was denied its requested relief because BIL contested the action and the injunction was not sufficient evidence of Reebok's "imminent" harm under Luxembourg law. App. 4a.

Unbeknownst to Reebok, Heatherdale then initiated summary proceedings against BIL using the same Luxembourg law previously used by Reebok. Unlike Reebok, Heatherdale was successful and obtained an order directing BIL to unblock the Heatherdale Accounts ("Luxembourg Order"). App. 4a-7a. Once the Luxembourg Order issued, the monies were transferred from the Bawnmore Accounts back into the Heatherdale Accounts and ultimately out of BIL. Supp. Ex. R. 440-444.

B. The Proceedings Below

Upon learning that the monies had been transferred from the Heatherdale Accounts, Reebok instituted a show cause hearing why McLaughlin, Heatherdale, Brigitte and BIL should not be held in contempt of court. The District Court initially denied contempt as against BIL,[6] reasoning "aiding and abetting . . . include a voluntary act" and that, in the instant matter, the existence of the Luxembourg

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[5]App. 4a; CR 199. Reebok did not attempt to obtain an exequatur, which is a procedure whereby judgments (not interim orders) rendered in foreign courts are given effect in Luxembourg. The exequatur is a full civil trial on the merits. CR 199; *and* Cydie Lorang, *Luxembourg*, International Execution Against Judgment Debtors, LUX 7-8 (Dennis Campbell ed., Clark, Boardman, Callaghan 1993).

[6]The District Court granted Reebok's request for an order of contempt against McLaughlin and Heatherdale. The action was dismissed as against Brigitte because she was not served. App. 17a.

Order removed all voluntariness on the part of BIL. App. 13a. However, the District Court clearly was concerned about BIL's conduct, acknowledging "BIL does not stand in a completely innocent light." App. 14a. On the then limited evidence, the District Court found it surprising BIL actively contested Reebok's procedures in Luxembourg[7] and at no point informed either Reebok or the District Court of McLaughlin's efforts to obtain the Luxembourg Order, even after Luxembourg's secrecy laws were waived. App. 14a.

Upon submission of newly discovered evidence, the District Court granted Reebok's motion for reconsideration and found BIL in contempt of the injunction. App. 25a, 32a-33a. Although many of the facts regarding notice of the injunction and subsequent movement of the monies were undisputed, the parties presented conflicting evidence as to BIL's motive for assisting Defendants in violating the injunction.[8] App. 22a-23a. Although the District Court found motive was not necessary for a finding of contempt,

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[7]The District Court cited Reebok's Luxembourg law expert, Mr. Andre Marc:

> It is my experience that where there is a dispute about monies in a Luxembourg bank account, the bank in the ordinary course will view itself as a stakeholder and allow the parties to present their claims to the courts. As it appears from reading BIL's opposition papers in the *Reebok v. BIL* action (in Luxembourg), BIL has opposed Reebok's request vigorously. This is surprising particularly because BIL admits it was informed that the monies in the Heatherdale Accounts were the result of counterfeiting activities. App. 14a.

[8]The District Court also found BIL's only evidence of motive, the statements of Rommes, to be wholly without credibility, stating "viewed in light of all of the evidence, his general denial of all wrongdoing on the part of BIL could not have been believed by any reasonable fact-finder." App. 36a.

the presence of such motive: (i) prevented the District Court from overlooking what it previously considered "merely a technical violation;" and (ii) removed the involuntary aspect of the Luxembourg Order. App. 26a-28a. Thus, the District Court found "[t]he totality of this evidence suggests that BIL assisted McLaughlin in the development and execution of a plan to get McLaughlin's money out of BIL." The plan included the creation of Bawnmore Holdings, Inc., and the transfer of funds within BIL to create a "safe haven";[9] the release of $117,000 prior to the Luxembourg Order (a portion of which went to BIL for potential legal fees); and obtaining the Luxembourg Order to justify BIL's release of all the funds. App. 19a.[10] The District Court found, in sum, "that BIL, albeit in as unobtrusive a way as possible, continually did everything it

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[9]The District Court found "it is not insignificant that BIL prepared the paperwork related to the transfer of funds into the [Brigitte Accounts] and that BIL also aided McLaughlin in forming and setting up the Bawnmore Corporation." App. 27a. The District Court also found "[h]ad Reebok were able to attach the meager sums remaining in the Heatherdale Account, it is readily foreseeable that BIL would have, just as it did in this motion, refused to provide information about where the funds had been transferred. BIL would have put its metaphorical hands in the air and either said (1) that it did not know where the funds went or (2) that banking secrecy regulations forbade the release of such information." App. 27a.

[10]BIL advised McLaughlin to bring the summary proceedings and did not oppose those proceedings. App. 29a-30a. The District Court found that while BIL had submitted a protracted written opposition in the identical action by Reebok, BIL admittedly did not produce such a written opposition in the action by Heatherdale. The court went on to note "the Luxembourg court can decide for itself whether there has been a fraud committed on that court, but it would appear to the court that BIL (by remaining silent) allowed McLaughlin to convince the Luxembourg court that the order to release funds was appropriate." App. 30a.

could to ensure that McLaughlin was able to remove his funds from the bank." App. 31a.

The Ninth Circuit reversed the District Court, finding the injunction had no effect in Luxembourg because it was not "registered" there. App. 56a-60a. As such, BIL had no obligation to abide by the injunction, could move the monies in contravention of the injunction and advise McLaughlin to proceed to a Luxembourg court to obtain an order minimizing BIL's liability. App. 57a. The Ninth Circuit also held the Luxembourg court's refusal to honor the injunction excused BIL from having to comply. App. 59a. In sum, the Ninth Circuit held "BIL's 'violation' of the injunction did not subject it to personal jurisdiction in California because it was under no obligation to comply in the first place." App. 58a-59a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision allows a defendant to nullify a court's orders by carrying out acts through a non-party aider and abettor who commits those acts in a country where the order is not "registered."

This Court should grant a writ of certiorari to review the decision of the Ninth Circuit because it:

(i) conflicts with the principles regarding the scope and reach of an injunction enunciated by the Fifth Circuit and this Court, as well as principles of international law;

(ii) creates confusion by applying the principles governing the enforcement of final judgments, which are free-standing and capable of enforcement in any jurisdiction, to the area of enforcement of

injunctions which are enforceable solely by the issuing court; and

(iii) threatens the viability of a court's inherent powers to enforce its injunctive authority in today's global economy.

I. THE COURT OF APPEALS' DETERMINATION THAT AN INJUNCTION'S MANDATE TERMINATES AT THE BORDERS OF THE UNITED STATES CONFLICTS WITH PRINCIPLES REGARDING THE REACH OF AN INJUNCTION AS ENUNCIATED BY THE FIFTH CIRCUIT AND THIS COURT.

The Ninth Circuit incorrectly held that an injunction issued by a United States District Court ordering defendants, over whom it had personal jurisdiction, to freeze their assets "had no effect [as to certain of defendants' assets held in a bank account] in Luxembourg because [the injunction] was never registered [in Luxembourg]." App. 58a.

This decision is in direct conflict with the principles enunciated by the Fifth Circuit in *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986), which held that jurisdiction over a person who has no contacts with the forum except that he/she knowingly aids and abets a party in violation of the court's order, "is necessary to the proper enforcement and supervision of a court's injunctive authority and offends no precept of due process." *Id.* at 716 (citations omitted).[11]

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[11]The *Waffenschmidt* court found due process requirements satisfied under two theories:

(continued...)

The Ninth Circuit attempted to distinguish the *Waffenschmidt* case, stating the Fifth Circuit "grounded its decision on the simple fact that the 'mandate of an injunction issued by a federal district court runs nationwide. . . .'" *Id.* at 716 (citations omitted). Although the Fifth Circuit in *Waffenschmidt* discusses the "nationwide" scope of an injunction, this language was more a function of the facts in the case rather than a limitation on a district court's power to issue an injunction effective only within the borders of the United States. Indicative of this is the Fifth Circuit's reliance upon *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932), which held:

> Disobedience constituted contempt of the court which rendered the decree, and was none the less contempt because the act was

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[11](...continued)

(i) the inherent powers of a court:

> Haling a person into court only upon finding that the non-party has aided in knowingly violating an injunction fulfills traditional notions of fair play and substantial justice because it is foreseeable that the person would be required to respond in that forum. *See World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Waffenschmidt, 763 F.2d at 721; and

(ii) traditional in personam jurisdiction analysis under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945):

> [Contemnors] purposefully engaged in activity outside [the forum] that would have the foreseeable and intended result of dissipating assets subject to marshalling in that forum. . . . Furthermore, intentionally violating a court's orders has a substantial effect on the administration of justice in general, as well as the proper completion of the . . . litigation in particular.

Waffenschmidt, 763 F.2d at 723.

> committed outside the district, as **the contempt lay in the fact, not in the place, of the disobedience to the requirement.**

Id. at 452 (emphasis added).

The reasoning by the Fifth Circuit comports with the reach of an injunction that this Court established in *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (district court "in exercising its equity powers may command persons properly before it to cease to perform acts outside its territorial jurisdiction") and confirmed in *United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965) (citations omitted) ("Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze property' under its control, whether the property be within or without the United States"); and the scope of an injunction over non-parties that this Court established in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) ("defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding").

This petition presents an opportunity for the Court to bring substantial certainty and predictability to the scope of a district court's inherent powers to enforce its injunctive authority against non-party aiders and abettors who commit contumacious acts outside the United States.

There is no doubt that when a district court's injunctive powers reach outside the United States, principles of international comity must be considered. *First Nat'l City Bank*, 396 F.2d at 901. However, the Ninth Circuit's *per se* rule that a court's injunctive powers as to non-party aiders and abettors terminate at the borders of the United States does not foster international comity. Rather, international

comity is better served where a court's inherent powers to issue and enforce an injunction are not usurped by a foreign tribunal.[12]

American courts are clearly capable of resolving extraterritorial questions. This Court has noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962) (political question doctrine). In fact, it is common for courts to resolve conflicts with foreign jurisdictions,[13] particularly in today's global society where there is an increasing nationalization of commerce.

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[12]Although the issue has not reached the court of appeals, at least one district court has held that a foreign court's interim injunction temporarily enjoining a United States citizen from certain actions does not need formal recognition by a United States court to "restrict conduct by [a defendant] within the territorial limits of the United States as well as in [the issuing court's forum]." *Pilkington Bros. P.L.C. v. AFG Indus., Inc.*, 581 F. Supp. 1039, 1040 (D. Del. 1984). The *Pilkington* court found such recognition would offend, rather than promote, principles of international comity.

[13]*See, e.g., Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993) (application of U.S. antitrust law to conduct of a foreign insurance market regulated abroad); *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990) (involving a bribe allegedly paid to Nigerian officials in exchange for a government contract); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the Southern Dist. of Iowa*, 482 U.S. 522 (1987) (production of evidence physically located outside the United States); *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661 (2d Cir. 1988) (deciding dispute over return of funds from a U.S. company to an entity confiscated during Nicaragua's civil war); *Republic of the Phil. v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. dismissed*, 480 U.S. 942, *and cert. denied*, 481 U.S. 1048 (1987) (enjoining former President of Philippines from transferring or encumbering property purchased with funds wrongfully taken from the Philippine government).

Thus, whereas the Fifth Circuit's reasoning comports with well recognized principles of international law whereby a court may prescribe laws with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory,"[14] and employ judicial or non-judicial measures to induce or compel compliance or punish non-compliance,[15] the Ninth Circuit's limit of an injunction to natural boundaries is unprecedented and reflects a profound lack of appreciation for the realities of litigation in the international arena.

II. THE COURT OF APPEALS' APPLICATION OF PRINCIPLES GOVERNING THE ENFORCEMENT OF JUDGMENTS TO THE AREA OF THE ENFORCEMENT OF INJUNCTIONS CREATES UNNECESSARY CONFUSION AND UNCERTAINTY.

The Ninth Circuit's application of the principles of recognition and enforcement of final judgments to the area of law governing injunctions is fundamentally flawed, constitutes judicial legislation, and threatens to create untoward confusion and complexity concerning the reach of a court's equitable powers as the courts struggle to accommodate a nonexistent link between final judgments and injunctions.

The Ninth Circuit held that if an injunction is to have any power beyond the United States (as to non-party aiders and abettors), it must be "registered" in the country of the non-party aider and abettor. The Ninth Circuit cites

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[14] *Restatement (Third) of the Foreign Relations Law of the United States* §402(1)(c) (1987).

[15] *Id.* §431(1).

the dicta in *Hilton v. Guyot*, 159 U.S. 113, 227 (1895) which states "judgments rendered . . . in . . . [a] foreign country . . . are not entitled to full credit and conclusive effect when sued upon in this country. . . ." However, *Hilton* did not deal with a court's injunctive powers, but rather the effects of a final judgment.

While final judgments can be registered in the United States[16] and elsewhere,[17] injunctions generally are not registrable.[18] Although the process for recognition and enforcement ("registrability") of foreign judgments differs

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[16]Judgments for the recovery of money or property entered in a district court are registrable in any other judicial district in the United States pursuant to 28 U.S.C. §1963.

[17]*See generally* Marissa Dionson, *Introduction*, International Execution Against Judgment Debtors, INT 12-14 (Dennis Campbell ed., Clark, Boardman, Callaghan 1993).

[18]18 U.S.C. §401 prevents a federal court from imposing a sanction for contempt of another court's injunction. The importance of maintaining enforcement of injunctive powers *only* in the issuing court is well recognized:

> [t]he courts are clothed with [the power to punish for contempt], and must be authorized to exercise it without referring the issues of act or law to another tribunal or to a jury in the same tribunal. For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants. (citations omitted).

Gompers v. Buck Stove & Range Co., 221 U.S. 418, 450 (1911).

among countries, certain basic requirements are universal, including the requirement of a final judgment. "A judgment is said to be final if it is not tentative, provisional, or contingent, and represents the completion of all steps in the adjudication of the claim by the court, short of its execution or enforcement." Marissa Dionson, *Introduction* at INT 12-14.

Under the Ninth Circuit's theory, where an injunction is not entitled to recognition and enforcement, the court of that country would have to retry the evidence before the injunction could become enforceable. *See, e.g., Waffenschmidt*, 763 F.2d at 721.[19] In reality, because most countries, including the United States, do not allow summary "registration" of interim injunctive orders, an American court injunction will always be subject to a foreign country's internal laws. The result would be a serious interference with the inherent powers of United States courts to enforce their orders. *See, e.g., Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the Southern Dist. of Iowa*, 482 U.S. 522, 539 (1987).

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[19]In the instant case, the injunction was not "registrable" under the procedures in Luxembourg because it was not a final judgment capable of execution. CR 199. In any event, because the United States and the Grand-Duchy of Luxembourg have not concluded a bilateral treaty regarding the recognition and enforcement of foreign judgments, the exequatur procedure to be followed is the normal civil procedure (full trial on the merits). *Id.*; *see generally* Cydie Lorang, *Luxembourg* at LUX 3-25.

III. THE QUESTION PRESENTED IS IMPORTANT TO THE CONTINUING VIABILITY OF A COURT'S INHERENT POWERS TO ENFORCE ITS INJUNCTIVE AUTHORITY.

An injunction is necessary to protect parties' rights in cases where the potential exists for fraudulent transfer of assets ("asset restraining order"). Asset restraining orders have been issued in a variety of cases, including, where a defendant has: violated counterfeiting or copyright laws; violated antifraud provisions of the Securities and Exchange Act; sold assets in violation of the Clayton Act; made false promises and representations in the sale of franchises; conducted deceptive trade practices; breached fiduciary duties to defraud savings and loan institutions; wrongfully acquired assets traceable to a bankrupt debtor's estate; fraudulently induced a plaintiff to acquire his business; or engaged in a pyramid-sales scheme.[20]

The reach of an asset restraining order becomes particularly important in a global economy where the potential for evading or violating such an order is enhanced due to the ease of access to foreign financial institutions located in jurisdictions with strict bank secrecy laws.[21] These jurisdictions are the choice among those who wish to

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[20]*See generally* Mark S. Lee, *Prejudgment Asset Freezes Against Software Pirates*, Computer Lawyer, Oct. 1992.

[21]This Court recognizes Congress' and the Executive Branch's concern "about [the] serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic, criminal, tax and regulatory enactments." *California Bankers Ass'n v. Shultz, 416 U.S. 21, 27 (1974)* (*citing* H.R. Rep. No. 91-975, 91st Cong., 2d Sess. 12-13 (1970)).

launder or secrete their money.[22] According to recent estimates, the amount of money laundered every year approaches $500 billion[23] and finances organized crime's ventures into such areas as international drug trade, insider trading, trafficking in nuclear materials and product counterfeiting. *Id.* Authorities report there is little question that international organized-crime syndicates are largely responsible for the boom in black-market counterfeits[24] – and for the number of injuries and deaths those products have caused.[25]

The economic cost of counterfeiting is estimated at $200 billion.[26] The losses not only affect the trademark owner, but also American jobs[27] and tax revenues.[28]

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[22]*California Bankers*, 416 U.S. at 28.

[23]Robert Peston, *Survey of Fraud - Prevention and Detection*, Financial Times, Oct. 18, 1994 at 33.

[24]"Commercial counterfeiting is a steady source of income for organized crime" and "serves to generate a documented cash flow through which the proceeds of more nefarious criminal activity can be laundered." John Bliss, *Counterfeiting In The Information Age: A Global Threat To Intellectual Property Protection*, Legal Backgrounder (Washington Legal Foundation, Washington, D.C.) Aug. 12, 1994, at 3-4.

[25]*Id.*

[26]*Id.* at 1-2; *see also Fact Sheet*, The IACC Update (The International Anticounterfeiting Coalition, Inc., Washington, D.C.) 1995.

[27]In 1993, the United States Customs Service estimated 750,000 jobs were lost due to counterfeiting of U.S. products. John Bliss, *Counterfeiting In The Information Age* at 1.

[28]According to Internal Revenue Service Commissioner,

(continued...)

Thus, the Ninth Circuit's decision threatens to render impotent the courts' injunctive powers necessary to preserve the status quo in the proliferation of cases involving counterfeiting and other fraudulent activities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
HARLEY I. LEWIN
GAYLE ROXANNE ELINGS
LEWIN & LAYTIN, P.C.
1776 Broadway, 15th Floor
New York, New York 10019
(212) 586-3490
Counsel for Petitioners

Dated: July 17, 1995.

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[28](...continued)
Margaret Milner Richardson, the tax gap, or the difference between the amount of taxes that should be reported to the IRS and the amount that is actually reported, is approaching $150 billion per year, a substantial portion attributable to income that is hidden in "tax haven" countries. Robert D. Hershey Jr., *I.R.S. Raises Its Estimate of Tax Cheating*, N.Y. Times, Dec. 29, 1993, at 1.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

REEBOK INTERNATIONAL LTD., et al., Plaintiffs, v. BYRON McLAUGHLIN, et al., Defendants.	) Case No.) 89-1739-GT P

ORDER GRANTING PLAINTIFFS' MOTION FOR CONTEMPT AGAINST BYRON McLAUGHLIN AND HEATHERDALE CORP.; DENYING PLAINTIFFS' MOTION FOR CONTEMPT AGAINST BANQUE INTERNATIONALE A LUXEMBOURG

On May 26, 1992 at 10:30 a.m., the plaintiffs motion for contempt came for hearing. The motion was titled for contempt against Byron McLaughlin, Brigitte McLaughlin, Heatherdale Corp., and Banque Internationale a Luxembourg. Byron McLaughlin and Heatherdale Corp. did not file any opposition to this motion; plaintiffs failed to serve the motion on Brigitte McLaughlin; and Banque Internationale a Luxembourg opposed the motion. The Court has fully considered this matter, including review of all papers filed by the parties in a timely manner (including the declaration of Andre Marc), the authorities cited therein, and the arguments presented.

FACTUAL BACKGROUND

This difficult portion of this motion revolves primarily around the question of whether the existence of a Luxembourg Order directing Banque Internationale a Luxembourg ("BIL" or "B.I.L.") to take certain actions absolves BIL of liability for contempt for this Court's earlier order. The facts are as follows:

Plaintiffs, Reebok International Ltd. and Reebok International Limited ("Reebok"), brought the initial action under the Lanham Act, 15 U.S.C. §§1051 et seq., to stop defendants from importing, distributing and selling counterfeit Reebok footwear in the United States and elsewhere throughout the world. Byron McLaughlin ("McLaughlin") and Heatherdale Corporation ("Heatherdale") were two of the several defendants.

On November 27, 1989, this Court issued a temporary restraining order ("TRO") which in part restrained defendants and others receiving actual notice from transferring defendants' assets allegedly obtained through counterfeiting activity. On November 29, 1991 the TRO was served by hand on BIL's New York office and by facsimile on BIL's Luxembourg office. BIL acknowledged receipt both orally and in writing.

The court subsequently issued a preliminary injunction which continued the TRO on December 11, 1989. The Court's written decision was entered on January 10, 1990. The preliminary injunction was similarly served on BIL at both its New York and Luxembourg offices.

Thereafter, on December 6, 1989, McLaughlin's wife, Brigitte McLaughlin, came to BIL in Luxembourg and presented a demand to transfer funds from an account

maintained at BIL by Heatherdale, a company controlled by McLaughlin. These funds were in a time deposit that did not mature until January 8, 1990. Although BIL would normally have honored its client's request and released funds immediately, BIL told Ms. McLaughlin that it would not release the funds until the due date of the deposit. Ms. McLaughlin responded, through her Luxembourg counsel, by challenging BIL's right to withhold these funds. Although BIL believed that it was on shaky grounds under Luxembourg law, it negotiated a compromise with Ms. McLaughlin where the money would be removed from the Heatherdale account, but would stay with BIL in another McLaughlin-controlled account. BIL thus managed to keep the funds at BIL. BIL did not, however, notify Reebok or this Court of the attempted effort to remove the funds.

Reebok meanwhile had instituted proceedings in a Luxembourg court requesting a "saisie-arret" on monies deposited in accounts at BIL in the name of McLaughlin and Heatherdale. A "saisie-arret" is akin to an attachment proceeding in the United States. On December 11, 1989, the Luxembourg court denied this request. A handwritten denial stated in essence that Reebok did not have a money claim against the defendants. This follows from the requirement that in order to obtain a "caicio-arret," a claim must be certain, liquid, and due.

Reebok then filed an application to obtain approval of the President of the Luxembourg District Court to bring a summary proceeding against BIL on an expedited basis. This request was refused on December 20, 1989 because the previous application for attachment had been refused.

Reebok then brought separate actions against McLaughlin and BIL under articles 806 and 807 of the Luxembourg Code of Civil Procedure seeking to restrain the

transfer of funds from the Heatherdale accounts. On January 22, 1990, the Luxembourg summary judge denied Reebok's request against BIL because (1) under Article 806, BIL had contested the action and (2) under Article 807, the Asset Orders were not sufficient evidence of Reebok's "imminent" harm under Luxembourg law. Article 807's "imminent harm" was taken from article 809 of the French Code of Civil Procedure. It has not been expressly defined under either French or Luxembourg law, and is subject to the discretion of the court.

At this point, Reebok brought its legal efforts in Luxembourg to halt. Reebok did not appeal these decisions, and Reebok did not attempt to obtain an "exequatur," a process whereby foreign judgments become recognized in Luxembourg.

The McLaughlins meanwhile continued to demand that the funds in the Heatherdale accounts be released. When they were not, a lawsuit was instituted against BIL by Heatherdale in the District Court of Luxembourg. BIL informed the Luxembourg court of the restraining order and the possibility of conflicting obligations. Nonetheless, on April 24, 1990, a Luxembourg court issued its order in the Heatherdale proceedings. Given the importance of this order to the resolution of this case, translated portions that are pertinent are set out below:

FACTS

HEATHERDALE CORPORATION is the holder of account No. 8-175/7630/100 on the books at B.I.L.

B.I.L. has been served a temporary restraining order issued by a California court on November 27, 1909 prohibiting all banks and generally any other financial

institutions from releasing the funds held by HEATHERDALE CORPORATION.

Moreover, by order of December 4, 1989, served at a B.I.L. office in New York, an Arizona judge has ordered the attachment of the accounts held by HEATHERDALE CORPORATION as B.I.L.

The plaintiff bases its petition for unblocking of the account on article 807 paragraph 1 of the code of civil procedure and subsidiarily on article 806 paragraph 1 of the same code.

It asserts that there has been no attachment in due form nor any decision from a Luxembourg court justifying the measure taken by B.I.L.

An act of violence presupposes material acts that injure the rights or property of a party or the claims of other by material usurpation of rights that the perpetrator does not have.

For there to be an act of violence, firstly, the perpetrator of the act of violence must have committed this act outside of any right, and secondly, such clearly illegal act must have caused intolerable detriment to a specific and evident right of another person. (Court of Appeals, *Teledistribution Konz v. Origer*, 4.20.88, No. 9843 of role).

The blockage of a bank account by a bank may constitute an act of violence which a summary judge may terminate by application of article 807 paragraph 1 of the Code of Civil Procedure (Ref. Lux. 10 November 1989, *Cofitec v. United Overseas Bank*, No. 1472).

The petition is therefore admissible on the basis of article 807 paragraph 1 of the aforementioned code.

As to cash deposits, deposits in connection with the account which the bank has on its books in the depositor's name and is subject to local law, the law of the bank necessarily prevails (Cass. civ. 2/6/73: Clunet 1975, 65 Audit memo).

The jurisdiction of the law of the bank is justified by the fact that the services characteristic of transaction take place on the premises of this bank. (Paris 29 March 1938: Clunet 1938, 749, Tanger memo).

B.I.L. has its principal office in Luxembourg and the aforementioned New York office is not a subsidiary.

The account relationship between the Luxembourg bank and the foreign client is therefore subject to Luxembourg law Lux. 26 June 1989, *Sayegh v. B.P.P. and B.N.P.*, No. 831/89).

Since the measures taken abroad against HEATHER DALE CORPORATION have only a territorial effect and since the opposition served on B.I.L. was not done in the form of proper attachment, supported by a title enforceable in Luxembourg or the permission or a Luxembourg judge, they cannot be considered valid or effective (Comm. court of Marseille, 20 January 1926, Journ. dr. int. 1927, 67).

Therefore, B.I.L.'s blockage of the account must be considered improper and the petition based on article 807 paragraph 1 of the code of civil procedure must be granted.

NOW THEREFORE

We,

* * *

order the corporation BANQUE INTERNATIONALE A LUXEMBOURG to unblock account No. 8-175/7630/100 of the company under British Virgin Island law HEATHERDALE CORPORATION and to execute the withdrawal and transfer orders that have been or will be submitted to it by the HEATHERDALE CORPORATION.

Following the issuance of the above order by the Luxembourg court, BIL then did follow the directives of Heatherdale Corporation and allowed the withdrawal of the funds. At no time prior to the withdrawal of the funds did BIL inform Reebok or this Court of Heatherdale's legal efforts to free the funds.

CONCLUSIONS OF LAW

I. Untimely Papers

The factual background relied upon by the court for determining this motion was only those documents that were timely filed, with the exception of the declaration of Andre Marc which was considered despite its being filed late. During the week preceding this motion hearing, the parties lodged a series of documents in which Reebok made additional allegations against BIL, and in which BIL responded briefly to those allegations. Reebok urged the court to consider this new evidence as it had not been available to Reebok prior to the time at which Reebok had been required to file its papers.

The court refuses to allow such new evidence to be filed. Instead, the court will rule on these motions at this time based on the evidence that is properly before it. If Reebok chooses, Reebok may file an application for reconsideration by following the procedures in Local Rule 7.1.(i)(l) based upon the newly discovered evidence. The court has reserved August 24, 1992 for a motion for reconsideration if Reebok chooses to file one. The parties are instructed to work out a briefing schedule that will allow sufficient time for the necessary international communications, but in any event all briefing must be complete by August 10, 1992.

II. The Court Finds Byron McLaughlin and Heatherdale Corp. In Civil Contempt

Neither McLaughlin nor Heatherdale, both defendants in the original action, filed an opposition to this motion. Under Local Rule 7.1(f)(3)(c), the failure to file papers can be construed as a waiver -- "a consent to the granting of the motion or other request for ruling by the court." The court construes the failure to oppose the motion in such a manner.

Moreover, the facts presented to the court, uncontradicted as they are, clearly support a finding of contempt as to defendants McLaughlin and Heatherdale. The TRO and preliminary injunction clearly forbade the transfer of the funds in the Heatherdale account. Those funds were in account in the name of Heatherdale, a company under the direction of McLaughlin. Under the direction of McLaughlin, Heatherdale instituted legal action in Luxembourg to force the release of the funds in the Heatherdale account. Ultimately, Heatherdale prevailed in this action, and under the direction of McLaughlin, the funds were withdrawn. These facts clearly and

unequivocally support a finding of contempt as to defendants McLaughlin and Heatherdale.

III. Reebok's Failure to Serve the Motion for Contempt On Non-party Brigitte McLaughlin Stops the Court From Entertaining the Motion with Respect to Brigitte McLaughlin

Reebok not serve this motion on non-party Brigitte McLaughlin. As a result, although it appears from these facts that Brigitte McLaughlin's actions would support a finding of aiding and abetting sufficient to warrant the legal holding of contempt, due process concerns prohibit the court from making such a finding at this time.

IV. The Court Finds That Banque Internationale a Luxembourg Is Not in Contempt

BIL throws its hands into the air and proclaims that it was stuck between a rock and a hart spot -- subject to inconsistent orders from two competing tribunals. Understandably, BIL complied with the order from the court in Luxembourg, the country where BIL is located. In defending itself against this action, BIL uses the Luxembourg Order to take two related arguments: (1) that the Act of State doctrine or Foreign Sovereign Compulsion doctrine excuses BIL's conduct, and (2) that because BIL was obeying the Luxembourg Order, BIL was not acting in concert with McLaughlin or Heatherdale, as would be required to hold a non-party liable for contempt.

Much is said in Reebok's and BIL's papers about "comity." "'Comity' summarizes in a brief word a complex and elusive concept -- the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum." *Laker*

Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984). "Comity, in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

"Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain." *Laker Airways*, 731 F.2d at 937. Accordingly, "American courts should ... take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location or its operations, and for any sovereign interest expressed by a foreign state." *Societe Nat. Ind. Aero. v. U.S. Dist. Court*, 482 U.S. 522, 546 (1986).

The question in the instant case is what effect, if any, the order issued by the Luxembourg court has on this Court's perceptions of this action of BIL. Of primary significance in reviewing the documents in support of and in opposition to this motion is that it appears to this Court that a mechanism existed by which plaintiffs could have had the United States order recognized in Luxembourg. The so-called "exequatur" procedure is a procedure whereby judgment rendered in foreign courts become recognized in Luxembourg. Plaintiffs did not attempt to obtain an exequatur. Indeed, the only explanation offered for this decision was that they did not believe that any benefit could come from following the procedure. The declaration of Andre Marc, Luxembourg attorney, in support of plaintiffs'

motion surmises that once plaintiffs' initial request for attachment was refused there was no reason to go through with the more lengthy process of exequatur as the reason to obtain exequatur is to allow attachment.

The April 24, 1990 opinion of the Luxembourg court appears to indicate, however, that there was another reason for plaintiffs to follow the exequatur procedures. Specifically, pursuant to article 546 of the Luxembourg code of civil procedure, a judgment may not be enforced in Luxembourg until it has received the exequatur of a Luxembourg court. As a result, the Luxembourg court included in its order the factual finding that there had not been any decision from a Luxembourg court justifying the freezing of the Heatherdale accounts. Although it is impossible to know if a Luxembourg court would have granted the exequatur had it been applied for or if Luxembourg court would have ruled differently had an exequatur been granted, plaintiff's failure to attempt to obtain an exequatur now places the court in the position of having to disregard what appears to be a reasonable ruling by a Luxembourg court. Given the Court's perception that there was a reason to obtain the exequatur the principles of comity are not fully implicated. The order should have been followed.

Even if there was no benefit or legal purpose to be gained by obtaining an exequatur, the court would arrive at the same legal conclusion. Similarly, had Reebok attempted to obtain an exequatur and had been denied, or had Reebok obtained an exequatur and yet the Luxembourg court still demanded that the Heatherdale accounts be unfrozen, then the principles of comity would truly be stretched to their limits as the judicial proceedings in Luxembourg would not have the appearance of reasonableness that they presently do. Even in such circumstances, however, what BIL is supposed to do when

faced with conflicting orders? If it were an United States bank or citizen subject to conflicting orders from a United States court and a foreign court, we would clearly expect the United States bank or citizen to abide by the United States courts order. The thought that a foreign court would then penalize the United States bank or citizen for following an order of a United States court seems preposterous. Similarly, clearly BIL was expected to comply with the order given to it by its own country's court system. This is not merely the situation where BIL asserts that its country's laws required it to do something. Instead, BIL faced a direct order, which could have resulted in BIL being held in contempt in Luxembourg had it failed to comply. *See also Federal Maritime Commission v. DeSmedt*, 268 F. Supp. 972, 974-75 (S.D.N.Y. 1967) ("I cannot, of course, direct and order anybody to violate the orders of his native land and I don't intend to do so, and I don't intend the United States Court to be so presumptuous as to attempt to intrude upon the sovereignty of any foreign nation, irrespective of the consent to do business here that that foreign government has given to its nationals.").

The above discussion becomes even more persuasive when viewed in the context that as a non-party, BIL can only be held in civil contempt if having knowledge of the order BIL was in active concert and participation with McLaughlin. *See* Fed. R. Civ. P. 65. Indeed, a non-party can be held liable for civil contempt if it aided and abetted another's violation of the injunction. "Although good faith is irrelevant as a defense to a civil contempt order, good faith is relevant to whether the [non-party] aided or abetted [the party] in dissipating the funds with knowledge that it was violating the court's orders." *Waffenschmidt v. Mackay*, 763 F.2d 711, 726 (5th Cir. 1985). BIL did not, as asserted by Reebok, transfer "the monies in the Heatherdale Accounts pursuant to McLaughlin's request." Instead, BIL

transferred the monies in the Heatherdale Accounts pursuant to an order from a Luxembourg court. The difference between the two characterizations is enormous. If BIL had done the former, BIL would have aided and abetted McLaughlin. Aiding and abetting, however, include a voluntary act. There was no such act here. For example, in *Massachusetts Mut. Life Ins. Co. v. Securities & E. Comm.*, 151 F.2d 424 (8th Cir. 1945), the Eighth Circuit held that actions were taken in order to comply with the provisions a Congressional act, the actions were not voluntary. *Id.* at 429. The court stated:

> Submission to a judgment or order of the court or to the requirements of a statute is not a voluntary action in a legal sense. *Compare Dakota Country v. Glidden*, 113 U.S. 222, 224, 5 S. Ct. 428, 28 L.Ed. 981; *Chicago Great Western Ry. Co. v. Beecher*, 8 Cir., 150 F.2d 394. In a moral or patriotic sense obedience to law may often be regarded as voluntary; but in a legal sense, unless otherwise provided by statute, there is no choice. Submission is coercive. *American Book Co. v. State of Kansas*, 193 U.S. 49, 24 D. Ct. 394, 48 L.Ed. 613.

Id. See also Matter of Combined Metals Reduction Co., 557 F.2d 179, 189 (9th Cir. 1977) ("[Appellant's] argument ignores the essential fact that all of the actions of the trustee were based on orders of the district court, orders which the trustee was not free to disregard. In essence, then, the trustee's acts were not 'voluntary,' since he was required to perform them."); *Cf. Hendrickson v. Branstad*, 934 F.2d 158, 161 (8th Cir. 1991) ("Iowa's compliance with the Juvenile Justice Act was not voluntary." The state's compliance was required by the district court's order that

the state officials submit a plan to bring the state into compliance with the Act.).

The Luxembourg Order removed all voluntariness on the part of BIL. As a result, BIL cannot, its actions being mandated by the Luxembourg court, be found to be an aider and abettor. Thus, as a non-party, BIL cannot be found in contempt of the court's injunction.

Finally, the court acknowledges that BIL does not stand in a completely innocent light. BIL did actively contest Reebok's procedures in Luxembourg, and did prevail. Mr. Marc's declaration in support of Reebok's motion described BIL's involvement as "surprising." Specifically, Mr. Marc stated:

> "It is my experience that where there is a dispute about monies in a Luxembourg bank account, the bank in the ordinary course will view itself as a stakeholder and allow the parties to present their claims to the courts. As it appears from reading BIL's opposition papers in the *Reebok v. BIL* action (in Luxembourg), BIL has opposed Reebok's request vigorously. This is surprising particularly because BIL admits it was informed that the monies in the Heatherdale Accounts were the result of counterfeiting activities."

Additionally, BIL at no point informed either Reebok or this Court of Heatherdale's effort to obtain the funds. Although bank secrecy laws arguably justified BIL's silence at the time of the initial request, once Heatherdale brought the action by filing it in a public forum many of the secrecy provisions were waived, and BIL could have communicated with Reebok and this Court without violating Luxembourg laws. The significance of BIL's silence lies in actions that

might have been taken had Reebok been notified of the Heatherdale proceeding. Presumably, Reebok could have appeared and at least have been heard prior to the order unfreezing the funds. Additionally, it is possible that an order from this Court could have stopped the Luxembourg proceeding entirely. *See United States v. Davis*, 767 F.2d 1025, 1037 (2d Cir. 1985). This Court had jurisdiction over McLaughlin and Heatherdale, and potentially could have ordered Heatherdale to stop pursuing action in another country – action that was not in compliance with this Court's earlier injunction.

The above facts, however, do not rise to a level that would justify a finding of contempt. Despite Mr. Marc's declaration that BIL's action were not the normal responses of a Luxembourg bank, BIL's actions were not unreasonable nor do they indicate the concerted effort to assist McLaughlin that Reebok would have the court believe. BIL was hailed into court by Reebok. BIL clearly has an interest in protecting its own business, which might include convincing its customers that it will take all legal measures possible to preserve their access to their funds. With respect to BIL's silence, BIL did not have an affirmative duty to notify Reebok or this Court of Heatherdale's efforts to obtain the funds in the Heatherdale accounts. Even once the Heatherdale action was instituted, and the secrecy requirement waived, BIL was under no affirmative duty to contact either Reebok or this Court. This conclusion is supported by Mr. Marc's declaration (filed in support of Reebok's motion) which admits that, in his opinion, although BIL had the right and the possibility to inform either the U.S. court, Reebok's attorneys or the company itself of Heatherdale's action to unblock the Heatherdale accounts, "BIL did not have the obligation (under Luxembourg law) to reveal the Luxembourg proceedings (Heatherdale/BIL) to this Court." BIL's silence is best

characterized as an omission, and because there was no duty, it will not be punished.

Of final note are the ethical duties imposed upon BIL by the Committee on Banking Regulations and Supervisory Practices in Basle, Switzerland on December 2, 1988 ("Basle Declaration"). The Association of Luxembourg Banks and Bankers communicated the Basle Declaration to all members of the Luxembourg banking profession in February 1989, and requested all Luxembourg banks to adhere to the proposals of the Basle Declaration and to elaborate, within each bank, precise measures to ensure the compliance with said principles. Point IV of the Basle Declaration states:

> Where banks become aware of facts which lead to the reasonable presumption that money held on deposit derives from criminal activity or that transactions entered into are themselves criminal in purpose, appropriate measures, consistent with the law, should be taken, for example, to deny assistance, sever relations with the customer and close or freeze accounts.

While this declaration suggests that BIL's behavior may not have been appropriate under these international guidelines, the declaration does not create a duty that warrants contempt in a civil litigation in the United States. More appropriately, BIL's conduct should be reviewed by the appropriate banking authorities in Luxembourg or in Europe. Reebok has failed to show that BIL had a duty to notify Reebok or this Court of the proceedings instituted by Heatherdale. Accordingly, BIL cannot be held in contempt for its silence.

CONCLUSION

IT IS HEREBY ORDERED that Byron McLaughlin and Heatherdale Corp. are found in contempt.

IT IS HEREBY ORDERED that Brigitte McLaughlin cannot be held in contempt because Brigitte McLaughlin was not served. As a result, although the motion was noticed for contempt against Brigitte McLaughlin this motion is no longer pending.

IT IS HEREBY ORDERED that Banque Internationale a Luxembourg is not in contempt.

IS HEREBY ORDERED that August 24, 1992 at 10:30 a.m. is the date reserved for any motion for reconsideration allowable under the Local Rules.

IT IS SO ORDERED.

May 27, 1992
Date

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

REEBOK INTERNATIONAL LTD. et al.,	Case No. 89-1739-GT (P)
Plaintiffs,	
v.	
BYRON McLAUGHLIN et al.,	
Defendants.	

ORDER GRANTING MOTION FOR CONTEMPT UPON RECONSIDERATION

On April 26, 1993, at 10:30 a.m., Reebok's motion for reconsideration came on for hearing. The hearing was conducted telephonically, and the court stated that it would file this order shortly. The Court has fully considered this matter, including review of the papers filed by the parties, the authorities cited therein, and the arguments presented.

BACKGROUND

On May 26, 1992, Reebok's motion for contempt came on for hearing. Following the hearing, the court issued a written opinion that held that Banque Internationale a Luxembourg (BIL) was not in contempt. The primary basis for this holding was that BIL had been ordered by a Luxembourg court to release the funds. As a result, BIL's action lacked the necessary voluntariness to warrant a

finding of contempt. In addition to all of the above, the earlier order made clear that it was not based on any of the papers that were filed late, but that instead these papers would be considered, if at all, in a motion for reconsideration to be heard on August 24, 1992. Because of various discovery matters, the hearing has been continued on several occasions to its present date of April 26, 1993.

Among the evidence that Reebok did not have at the time of the earlier hearing is the declaration from Brigitte McLaughlin. Additionally, Reebok has now obtained some discovery from BIL, and has submitted some of these documents in support of this motion. The totality of this evidence suggests that BIL assisted McLaughlin in the development and execution of a plan to get McLaughlin's money out of BIL. The plan included the creation of Bawnmore Holdings, Inc., and the transfer of funds within BIL so as to create a safe haven. The plan also included the release of $117,000 prior to the Luxembourg Order (a portion of which went to BIL for potential legal fees). The plan finally included obtaining an order from the Luxembourg court, in an attempt to provide BIL with a justification for the release of all funds. BIL did not oppose the action for the release of funds or even inform the Luxembourg court of its reasons for not previously releasing the funds. Although Brigitte claims that Byron told her that he had bribed BIL to get some money out, this allegation has not been considered for purposes of this motion.

In what can only be described as incredible testimony, Jean-Jacques Rommes, the head of the litigation department of BIL, denies each of the allegations, and restates that BIL did nothing more than obey the commands of the Luxembourg court order.

DISCUSSION

A. Preliminary Defenses

Some preliminary matters persist from the earlier hearing. Specifically, three defenses raised by BIL were not addressed at the May 1992 hearing because the ruling was in BIL's favor. These defenses were based on lack of personal jurisdiction and on the consent judgment. Reebok erroneously argues that BIL should not be able to re-assert these defenses; these issues, however, were not ruled on at the prior hearing. As a result, BIL may appropriately raise these issues, although, as the following discussion indicates, the review of these issues does not effect the outcome of these proceedings.

BIL also raises for the first time an argument related to good faith actions based on advice of counsel. Unlike the personal jurisdiction and consent judgment issues, the advice of counsel argument is not appropriately raised at this time.

1. Release and/or Res Judicata as a Result of Settlement

BIL argues that the settlement agreement of May 17, 1992 and the consent judgment entered on October 28, 1991 bar this action under res judicata principles, and in the alternative Reebok has released BIL of any claims it might have against it. Reebok, however, has shown that Byron McLaughlin has materially breached the settlement agreement by failing to pay any portion of the settlement amount. As such, the court will set aside the final judgment entered on October 28, 1991. With the final judgment set aside, the arguments of release and res judicata cannot bar this litigation.

Moreover, res judicata and release are not defenses that BIL may raise in the present situation. Instead, these are defenses that can only be raised by Byron McLaughlin. Byron McLaughlin, however, chose not to raise either of these defenses (thereby waiving them), and was found in contempt by this Court at the May hearing based on his non-opposition. As BIL's rights, if any, under the settlement agreement would emanate from Byron McLaughlin's rights, BIL likewise forfeited those rights, and since BIL was not a party to the agreement, BIL has no complaint as a consequence.

2. Personal Jurisdiction[1]

Under a traditional analysis, personal jurisdiction arises out of specific jurisdiction, as opposed to general jurisdiction. Such an analysis would require application of the traditional *International Shoe* analysis as it has been developed. Applying such a standard, BIL's contacts with this jurisdiction, assuming all allegations are proven, do warrant the assertion of personal jurisdiction. It does not go unnoticed that BIL purposefully entered into a banking agreement with Byron McLaughlin and then engaged in numerous conversations. Although it would not be appropriate to say that BIL does business in California, or in the United States for that matter, BIL does accept money from citizens of this country and of this state. The essential

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[1]The determination of personal jurisdiction in case such as this one revolves around findings on the merits of the motion itself. The basis of personal jurisdiction, if it exists, evolves out of the allegations that make out the contempt. As the discussion will indicate, the finding of contempt will be the most significant factor (and in some cases the only factor) justifying the finding of personal jurisdiction. As a result, because of the intertwined nature of personal jurisdiction and the merits, nonparties may not raise issues of lack of personal jurisdiction to avoid an inquiry into the merits.

contact, however, relates to the allegations of assisting McLaughlin in his efforts to release the funds held at BIL. By providing such assistance, BIL engaged in activity outside of California "that would have the foreseeable and intended result of dissipating assets subject to marshalling in that forum." *Waffenschmidt v. MacKay*, 763 F.2d 711, 723 (5th Cir. 1985). In essence, to the extent that minimum contacts are required, personal jurisdiction over a non-party in a case such as this one may found by construing the non-party's act of assisting in the violation of an injunction as a "super-contact."

Under a very similar theory, an alternative analysis has developed in cases of contempt under Rule 65. Separate and apart from the traditional contacts analysis, these cases hold that a bank may have personal jurisdiction over a non-party based on the court's inherent authority to enforce its own orders. *See Waffenschmidt v. MacKay*, 763 F.2d 711, 721 (5th Cir. 1985); *N.Y. State National Organization for Women v. Terry*, 732 F. Supp. 388, 399-400 (S.D.N.Y. 1990). Alternatively stated, given BIL's knowledge of this Court's Order, BIL must have foreseen litigation in this jurisdiction as a result of a violation of that Order. Such foreseeable litigation does not offend traditional notions of fair play and substantial justice. *Waffenschmidt*, 763 F.2d at 721. To quote the Southern District of New York: "Respondents brash assertion that they should be allowed to act in concert with defendants in order to intentionally violate a court order of which they had actual notice, while retaining impunity from the imposition of coercive sanctions fashioned to assure compliance with the order, is as groundless as it is insolent." *N.Y. State National Organization for Women v. Terry*, 732 F. Supp. 388, 40 n.5 (S.D.N.Y. 1990).

Finally, *Lynch v. Rank*, 639 F. Supp. 69 (N.D. Cal. 1985), is of no assistance to BIL. BIL's belief, even if found to be true that it was not acting in violation of the restraining order is irrelevant. *Lynch* did not state the rule that a plaintiff must prove that a non-party had the "motive" to assist in the violation of an injunctive order. Instead, *Lynch* held that where a non-party was acting completely independently of the party, assertion of jurisdiction over the non-party would be inappropriate. BIL's insistence that it was merely conducting business as usual would not avail it of the exception in *Lynch* as it would not rise to the level of "independent" conduct described in *Lynch*. To the contrary, if Reebok's allegations stand up (and they do), BIL did assist Byron McLaughlin in violating this Court's order. As a result, BIL is subject to this Court's jurisdiction – litigation that it must have foreseen.

3. Advice of Counsel

Reebok properly objects to BIL's assertion of an advice of counsel defense. This defense had not properly been raised earlier and thus is deemed waived.

B. No Review Will Be Made of the Earlier Legal Conclusion

A significant amount of the briefing for reconsideration addressed the legal issues raised in the May 28, 1992 order. Particularly, there was continued debate over the applicability and non-applicability of the "exequatur" procedure. There is no reason, however, to reconsider the earlier analysis of the "exequatur" procedure under the Luxembourg law. Importantly, the issue is irrelevant. Even if the exequatur procedure was not available to Reebok as a means of securing the freezing the funds at BIL, the fact would still remain that the order of the Luxembourg court

would still be in effect, and BIL would still have had an obligation to comply with the order. *The discussion of the exequatur in the previous order was not critical to the ultimate holding*, but merely added additional support for why respect for the Luxembourg Order warranted not finding BIL in contempt. Even without this additional support, and even had Reebok done everything in its power to secure the monies (accepting Reebok's argument regarding the exequatur), the previous facts would not justify a finding of contempt.

C. Legal Standard for Finding a Non-party in Contempt

With respect to non-parties, Rule 65(d) of the Federal Rules of Civil Procedure provides in pertinent part that an order granting an injunction "is binding ... upon those persons in active concert or participation with [the parties] who receive actual notice of the order...." Fed. R. Civ. P. 65(d). As explained by Judge Learned Hand, "the only occasion when a person *not a party* may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone to far, but what it has the power to forbid, the act of the party. This means the respondent must either abet the defendant, or must be legally identified with him...." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930). Although Judge Hand sought to place the outer limits on finding non-parties in contempt, it is clear that a non-party may be bound by an injunction where it is proven that the non-party "participated in the contumacious act" of the party. *G. & C. Merriam Co. v. Webster Dictionary Co. Inc.*, 639 F.2d 29, 35 (1st Cir. 1980).

D. New Evidence, and its Relation to Contempt

Reebok has presented new evidence[2] in support of this motion for reconsideration. The earlier order on the contempt issue was based on the perception that BIL was stuck between a rock and a hard spot -- subject to inconsistent orders from two competing tribunals (the Luxembourg court and this Court). Continuing to recognize the validity of the earlier order, there would be two situations which could give rise to a finding of contempt: (1) that BIL's banking conduct prior to the Luxembourg Order should result in a finding of contempt with respect to portions of the released funds or (2) that BIL's participation

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[2]Contrary to BIL's initial opposition to the motion for reconsideration, Reebok made a sufficient showing that it did not have the "new" evidence in its possession prior to the earlier filing deadlines, and that it made adequate efforts to secure the evidence. Brigitte McLaughlin was in France, and apparently somewhat reluctant to provide the information requested by Reebok. Despite BIL's allegations of the cozy relationship between Reebok and Brigitte, the fact remains that Brigitte did not sign the declaration until after the latest filing deadline for the May hearing. Moreover, Reebok's attempt to get these papers before the court prior to the hearing date, albeit after the filing deadline, belies the suggestion that Reebok was following a tactical strategy, and having lost wants to try a different one. Thus the new evidence should be considered.

Additionally, Reebok did not have access to discovery at the time of the May 1992 hearing, so clearly all of this evidence is new evidence and appropriately considered as a basis for reconsideration.

Although the new evidence as whole will be considered, it should be noted that Brigitte's allegation that Byron told her he had bribed someone at the bank to get the monies released is not considered for purposes of this motion. The statement is an out of court statement offered for the truth of the matter asserted, namely that BIL's conduct was not innocent. As a result, the statement is hearsay, and therefore inadmissible.

The remaining evidence, however, has not been objected to and is admissible.

in obtaining the Luxembourg Order justifies a finding of contempt with respect to all of the released funds. In the present context, "comity" is no longer of any relevance. Instead, the question turns from its prior emphasis on the impact of the order issued by the Luxembourg court (which has been resolved in BIL's favor) to the current emphasis on BIL's conduct prior to the Luxembourg court order.

1. BIL's Banking Conduct Prior to the Luxembourg Order

At the earlier hearing, BIL acknowledged that it had transferred money from McLaughlin's Heatherdale Account to another account in Brigitte's name and then to another account, the Bawnmore Account, which ultimately was controlled by Byron McLaughlin. The May 1992 Order accepted the innocent explanation of these transfers, reasoning that the compromise BIL worked out with McLaughlin acted to keep the money at BIL. Although the court did not make a finding of contempt in the May 1992 Order, these transfers were technical violations of the restraining order -- the assets of McLaughlin were not to be transferred. The court is now of the opinion that these violations should not be viewed merely a technical violation. In not finding contempt previously, the court accepted as a factual matter the explanation that BIL was attempting to appease an irate customer and truly desired to keep the money at the bank. There is, however, second explanation, namely that the money was moved in an effort hide the money from Reebok. Based on all of the evidence now before the court, the court finds that BIL's motive was to assist McLaughlin in hiding the funds that were originally in the Heatherdale Account. Importantly, such motive is not necessary for a finding of contempt -- but the presence of such motive prevents the court from overlooking what was previously considered merely a

technical violation. The significant facts include that Reebok already knew of the Heatherdale Account; the Heatherdale Account was included as a specific account to be frozen in the restraining order. The Heatherdale Account having already been identified, McLaughlin felt it was necessary to remove the funds from that account as soon as possible. Although McLaughlin may have preferred withdrawing the money from BIL entirely, McLaughlin knew, as did BIL, that the transfer of funds into another account at BIL would provide additional time to withdraw the money later, if not permanently safeguarding the funds. Had Reebok been able to attach the meager sums remaining in the Heatherdale Account, it is readily foreseeable that BIL would have, just as it did in this motion, refused to provide information about where the funds had been transferred. BIL would have put its metaphorical hands in the air and either said (1) that it did not know where the funds went or (2) that banking secrecy regulations forbade the release of such information. Viewed in light of this second explanation, the moving of funds (even within BIL) is no longer merely a technical violation. It is a blatant violation of the court's prior order that assets not be transferred, creating at least a temporary safe haven for the funds in the event that BIL was ordered to release monies in the Heatherdale Account.

Moreover, it is not insignificant that BIL prepared all of the paperwork related to the transfer of funds into the account of Brigitte McLaughlin and that BIL also aided McLaughlin in forming and setting up the Bawnmore Corporation. With respect to the corporation, BIL presented Brigitte with a list of titles to choose from, and after she selected "Bawnmore," BIL again prepared the necessary documents to form the corporation and then to transfer funds into this account. It is undisputed that BIL was a conduit in this scheme, allowing its banking facilities

to be used to illegally transfer funds. Indeed, as the court alluded in the May 1992 Order, absent the specific directive of the Luxembourg court, BIL's mere participation in carrying out McLaughlin's requests is sufficient to justify a finding of contempt. *See, e.g., South Central Bell Telephone Co. v. Constant, Inc.*, 304 F. Supp. 732, 735-36 (E.D. La. 1969), *aff'd*, 437 F.2d 1207 (5th 1971) (in dicta, court held that non-party telephone company could be found in contempt when it had the means to prevent its equipment from being used in violation of the injunction -- failure to use such means would result in passive participation in the violation). Even beyond such passive participation, however, the court finds that BIL actually assisted McLaughlin in creating and devising a scheme that would allow McLaughlin to get around the court order while minimizing the risk that BIL was exposed to.

Unrelated to the above, BIL now admits that it transferred approximately $117,000 out of BIL prior to the Luxembourg Order. BIL's only defenses for this conduct are that the transfer was pursuant to the compromise agreement with McLaughlin and that BIL was able to preserve the principal amount (*i.e.*, the money transferred was interest or could be replaced by future interest). Neither of these arguments excuse BIL's conduct. The restraining order from this Court was not limited to principal, but referred to assets, and thus would encompass interest accrued on those assets. The compromise agreement may have been an effort by BIL to appease the irate McLaughlin, but the fact remains that the transfer did precisely what the court said BIL could not do in the May 1992 order: transfer funds at the request of McLaughlin, as opposed to at the direction of the Luxembourg court. As a result BIL can be and should be found in contempt for this transfer.

To restate the most important issues, a finding of contempt requires clear and convincing evidence. In this regard, BIL should be found in contempt for transferring assets within BIL from one account to another and BIL should be found in contempt for releasing the $117,000 it refers to simply as interest. Moreover, it is no defense, as BIL would have the court believe, that BIL was simply following the normal and customary practices for Luxembourg banks. This argument is so incredibly non-meritorious it need not even be discussed. BIL wants the court to believe that because BIL was following normal and customary practices, it was not assisting McLaughlin, but instead was acting in its own interest. If BIL's view of the law on this issue were adopted, no bank could ever violate a court order to freeze assets. Here, the restraining order was specifically designed to freeze McLaughlin's assets. If this meant nothing else, it meant that McLaughlin was not to withdraw any money that he had in any account. Given the existence of the order, BIL (and for that matter any other bank with notice of the order) should have ceased to follow normal banking practices when it came to the assets of Byron McLaughlin.

2. BIL's Participation in Obtaining the Luxembourg Order

The evidence related to BIL's participation in the efforts to obtain the Luxembourg Order is less clear, but is likewise sufficient to support a finding of contempt. Importantly, the court's previous conclusions on BIL's motives impact the court's findings related to BIL's involvement with the Luxembourg Order. Viewed in light of the totality of circumstances, it becomes more and more clear that BIL was attempting to do everything it possibly could to assist McLaughlin in his effort to get the funds out of BIL, while attempting at the same time to minimize its own potential liability.

On February 23, 1990, Mr. Kinsch, lawyer for McLaughlin, wrote to McLaughlin regarding the upcoming lawsuit in Luxembourg: "As to the suit that HEATHER DALE was to bring against the Bank, Mr. Rommes agrees to it." In the April 14, 1990 letter from McLaughlin to BIL is the following sentence: "After four and a half months of waiting patiently and going through *all the requests of yourself and the bank* and in the end getting a jurisdictional court order allowing the bank no risk...." Again, there is the possibility of two conclusions being drawn from these facts: (1) that BIL tried to fend off an irate McLaughlin by telling him that he would have to get a court order before the funds would be released or (2) that BIL suggested McLaughlin proceed to a Luxembourg court as a way of allowing the release of funds while minimizing BIL's liability. Viewed in light of all of the evidence, the court finds that BIL suggested McLaughlin proceed to the Luxembourg court. Again, BIL no longer stands merely as an innocent bystander. It clearly violated the restraining order when it transferred the $117,000 prior to the Luxembourg Order; it also clearly violated the restraining order when it allowed the movement of funds within BIL. All of BIL's conduct points to one simple conclusion -- that BIL was doing everything that it could to ensure the release of funds, all the time while trying to minimize its own liability. And in doing everything that it could to ensure the release of funds, BIL violated the restraining order.

Moreover, Mr. Rommes admits that there was no written reply to the Heatherdale action. Although the court has discredited much of Mr. Rommes testimony, it does appear that there was no opposition to the Heatherdale action. The Luxembourg court can decide for itself whether there has been a fraud committed on that court, but it would appear to the court that BIL (by remaining silent) allowed McLaughlin to convince the Luxembourg court that the

reasoning of *South Central Bell Central Telephone Co. v. Constant. Inc.*, 27 304 F. Supp. 732, 735-36 (E.D. La. 1969), *aff'd*, 437 F.2d 1207 (5th 1971), BIL should have taken steps to prevent its banking facilities to be used in violation of the restraining order. In the present instance, BIL should have, at a minimum, informed the Luxembourg court of the United States order – BIL's reason for not releasing the funds in the first place – and given the Luxembourg court the opportunity to order the release of the funds with full knowledge of the facts. Instead, BIL remained silent so that an order would be entered requiring the release of the funds. Such conduct assisted McLaughlin in removing all of the funds held at BIL. Such conduct also eliminates the element of good faith that excused BIL's reliance on the Luxembourg Order.

Unquestionably, it would be preferable prior to making a finding of contempt that the court be presented with the proverbial smoking gun – a piece of evidence that demonstrates unequivocally BIL's active involvement in the orchestration of this scheme. The absence of such a damning piece of evidence, however, does not warrant ignoring the evidence that is before the court, evidence that points again and again to the factual finding that BIL, albeit in as unobtrusive a way as possible, continually did everything it could to ensure that McLaughlin was able to remove his funds from the bank. As a result, BIL is appropriately held in contempt for having aided and abetted McLaughlin in removing all of the funds from BIL.

3. Sanctions for Contempt

At no point do the voluminous papers presented in support of this motion address the issue of the proper sanctions for a finding of contempt. As a result, the hearing on the issue of the proper sanctions based on the

court's finding of contempt is set for June 14, 19 at 10:30 a.m.

- Reebok's moving papers will be due on May 17, 1993;

- BIL's papers will be due on June 1, 1993;

- any reply will be due on June 7, 1993.

The moving papers and the opposing papers shall not be more than 15 pages and the reply shall not be more than 7 pages. Moreover, parties are specifically directed to refrain from rearguing any of the issues addressed by the court in this order, and to limit their arguments to the proper sanction.

CONCLUSION

IT IS HEREBY ORDERED that the final judgment is set aside.

IT IS HEREBY FURTHER ORDERED that BIL's defense of *res judicata* and release are not persuasive because the final judgment has been set aside and because these defenses were waived when they were not raised by Byron McLaughlin.

IT IS HEREBY FURTHER ORDERED that non-party BIL may not raise the issue lack of personal jurisdiction to avoid an inquiry into the merits. Moreover, the court's finding of contempt provides the court with personal jurisdiction over a non-party who had notice of the prior order and who was assisting the party violate that order.

IT IS HEREBY FURTHER ORDERED that any attempt by BIL to assert a defense based on the advice of counsel is not timely and is deemed waived.

IT IS HEREBY FURTHER ORDERED that the earlier "legal" rulings of the court will not be reconsidered. "Factual" rulings, however, have been reconsidered.

IT IS HEREBY FURTHER ORDERED that the court finds BIL in contempt. BIL violated the injunction by assisting in the transfer of funds out of the Heatherdale, even though the funds did not leave BIL. BIL violated the injunction by assisting in the transfer of $117,000 out of BIL prior to the Luxembourg Order. Finally, BIL violated the injunction by assisting McLaughlin in obtaining the Luxembourg Order.

IT IS HEREBY FURTHER ORDERED that a motion on the proper sanctions as a result of the contempt will be heard on June 14, 1993 at 10:30 a.m.

IT IS SO ORDERED.

April 27, 1993
Date

/s/Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

REEBOK INTERNATIONAL LTD. et al.,	) Case No. 89-1739-GT (P)
Plaintiffs,	)
v.	)
BYRON McLAUGHLIN et al.,	)
Defendants.	)

ORDER ON MOTIONS SET FOR JUNE 14, 1993

On April 26, 1993, at 10:30 a.m., REEBOK's motion for reconsideration came on for hearing. The court subsequently issued an order finding Banque Internationale a Luxembourg (BIL) in contempt. The court proceeded to order the parties to brief the issue of the amount of sanctions to be imposed as a result of BIL's contempt.

On June 14, 1993, at 10:30 a.m., the court heard REEBOK's motion to fix the amount of sanctions. The hearing was conducted telephonically, and the court stated that it would file this order shortly. The court has fully considered this matter, including review of the papers filed by the parties, the authorities cited therein, and the arguments presented.

DISCUSSION

I. BIL's Disguised Motion for Reconsideration

A. The Court Will Not Reconsider

In the most recent order, the court stated: "parties are specifically directed to refrain from rearguing any of the issues addressed by the court in this order, and to limit their arguments to the proper sanction." Despite this admonition, the next three-plus pages of this order are devoted to issues relating to the prior finding. First, BIL argues that the finding of contempt was inappropriate as a matter of fundamental due process -- arguing that a full evidentiary hearing on the propriety of the contempt sanction was required. In support of this argument, BIL relies on *Mercer v. Mitchell*, 908 F.2d 763 (11th Cir. 1990), arguing that the court must hold an evidentiary hearing regardless of "whether or not [the court] is requested to do so by the defendant." *Id.* 908 at 767 n.7.

The court respectfully disagrees with the conclusion that a divided panel of the Eleventh Circuit reached in *Mercer*. Of course, as an Eleventh Circuit opinion, *Mercer* is not binding on the court. Not being bound to follow this opinion, the court has reviewed the issues and is more persuaded by the arguments contained in what can best be described as a particularly bitter dissent written by the judge in the minority. Specifically, the dissent would have required the defendants in that case to present their arguments to the district court prior to raising them on appeal. Moreover, the dissent specifically refused to allow defendants to wait until after the contempt hearing to raise the due process argument. In comparing these two options, the court finds that there is no basis for not requiring an alleged contemnor (in this case BIL) to raise its objections

to the proceedings and to request a hearing, or to forego those options. This is not a situation where the contempt proceedings were a surprise. BIL knew full well that the court was considering Reebok's allegations of contempt, and although an order to show cause was never technically issued, BIL knew that it would be found in contempt if the court found that Reebok had met its burdens. Clearly, BIL had its opportunity to demonstrate to the court that it had not committed the acts in question or alternatively that its acts were excused. Additionally, BIL could just have easily at that point directed the court's attention to the Eleventh Circuit's opinion in *Mercer*. Having chosen not to, and no other basis for reconsideration having been presented, the court will not reconsider its earlier finding that BIL is in contempt.

B. Even If the Court Did Reconsider, it Does Not Appear That an Evidentiary Hearing Would Be Required

Although the court reiterates that it will not reconsider its prior finding of contempt, the court does not believe that it would have conducted an evidentiary hearing even if presented with the authority in *Mercer* in a timely fashion. The court is not unmindful that material factual disputes must be resolved by way of an evidentiary hearing; however, the court's prior holding was based on the finding that there was no such dispute. BIL is free to argue that such is not the case, but the court did not (and does not) agree. Primarily, BIL wants to create a material issue of fact through the declaration of Jeanne-Jacques Rommes, the head of the litigation department of BIL. The court stated in the earlier order that his testimony was incredible. Viewed in light of all of the evidence, his general denial of all wrongdoing on the part of BIL could not have been believed by any reasonable fact-finder. In the present situation, the fact-finder would have been the court, and the

court maintains its position that no additional evidence was necessary. Accordingly, there was no need for an evidentiary hearing, and there was no deprivation of due process.

C. Certification for Interlocutory Review Is Inappropriate

In yet a final attempt to discourage the court from ruling on the amount of sanctions, BIL argues that the court should certify the finding of contempt for interlocutory review. BIL's request, however, grows out of the erroneous assumption that certification for interlocutory review will act as "an alternative to the extended proceedings that are required before a contempt sanction can issue." There are not going to be "extended proceedings." As more fully discussed below, there will be no continuances and this order will act as the final order on this matter. Accordingly, there is no need for interlocutory review as appeal is now a matter of right following the entry of this order. BIL may now, if it chooses, bring all of these issues to the attention of the appellate court.

D. BIL Should Not Be Sanctioned for Raising the Arguments Related to Due Process

As the final of the preliminary matters, Reebok argues that BIL should be sanctioned for disregarding the court's explicit directive to confine the briefing solely to the issue of the amount of sanctions. The court hereby denies this request. Although the court has chosen to disagree with *Mercer*, there was at least a reasonable argument based on that opinion that it was appropriate to raise these issues even though not raised previously. Again, the court finds that argument unpersuasive, but the court will not sanction under such circumstances.

II. What Is the Proper Sanction?

A. Reebok's Damages as a Result of Contempt

1. Continuance to Allow More Discovery Is Not Appropriate

BIL expresses its belief that it is "entitled" to discovery before being required to continue with these proceedings. BIL's request, however, comes to late. This matter has not magically arrived on the court's calendar. Instead, the parties have been contesting most of these issues for some time. If BIL wanted discovery, it could have asked for it long ago. It simply is not appropriate to have waited until the time of the motion to proclaim that the proceedings must be delayed.

2. Reebok's Actual Damages

BIL argues that sanctions should be limited to $117,000, the amount of money that BIL transferred prior to the Luxembourg Order. Limiting the sanction amount in such a manner would be entirely contradictory to the court's holding that BIL assisted in obtaining the Luxembourg Order. Specifically, the court's earlier ruling held that BIL's release of the funds was no longer excused by the Luxembourg Order.

BIL now argues that its conduct had no causal effect on the release of funds. The court cannot agree. Although the court and the parties can only guess as to what would have happened had BIL not acted as it did, the court finds it highly unlikely that the Luxembourg court would have ordered the release of the funds had that court known of this court's freeze order.

Based on the foregoing, the court finds that Reebok has suffered damages in an amount equal to the funds that were released from BIL. The court finds that this amount is less than the amount remaining to be paid on the judgment, and thus Reebok would have been able to attach all of these funds. As Reebok can no longer attach such funds, the funds represent the amount of Reebok's damages. The court is not persuaded by BIL's arguments that Reebok could have collected this money (or at least a portion of it) elsewhere. Reebok was entitled to collect it all from McLaughlin if it chose, and that option has now been severely impaired, if not eliminated entirely. Accordingly, Reebok's damages are represented by the total amount of McLaughlin's funds held at the time BIL received notice of the freeze order (plus interest). Similarly, BIL's argument that Reebok must now prove that a Lanham Act violation occurred and what damages were suffered ignores that Reebok in fact did have a valid judgment that it was entitled to collect on. Had BIL not assisted McLaughlin in the transfer of funds, Reebok could have collected all of McLaughlin's money held by BIL. This amount, and no other, represents Reebok's damages as a result of the contempt.

Based on the evidence provided in support of and in opposition to this motion, the court hereby sanctions BIL $2,442,070.80. This amount reflects the U.S. dollar equivalent of the monies (including interest) held by BIL at the time it received notice of the freeze order. This amount would have been available to Reebok in satisfaction of the judgment had BIL not assisted and aided McLaughlin. As a result, this amount represents Reebok's damages as a result of BIL's contempt.

B. Attorney Fees and Costs

Finally, BIL argues that Reebok's submissions related to attorney fees and costs are unreasonable. BIL's specific objections do not warrant departing from Reebok's revised requested amount. Attorney fees and costs are hereby awarded in the total amount of $238,346.50.

CONCLUSION

IT IS HEREBY ORDERED that the court will not reconsider its prior finding of contempt. BIL has not presented the court with new evidence, but instead wants to raise legal arguments that could have been raised, but which were not raised, earlier.

IT IS FURTHER ORDERED that BIL's request for certification for interlocutory review is DENIED. This final order eliminates the necessity for any interlocutory review, even if it previously would have been appropriate.

IT IS FURTHER ORDERED that Reebok's request to sanction BIL for arguing matters related to reconsideration despite the explicit directive from the court not to do so is DENIED.

IT IS FURTHER ORDERED that BIL is sanctioned in the amount of $2,442,070.80, the amount reflects the U.S. dollar equivalent of the monies (including interest) held by BIL at the time it received notice of the freeze order.

IT IS FURTHER ORDERED that BIL is sanctioned to reimburse REEBOK for attorney fees and costs in the combined total amount of $238,346.50.

IT IS SO ORDERED.

June 14, 1993
Date

/s/Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States, District Judge

cc: Lawrence Harnett, Esq.
MARKS & MURASE
399 Park Avenue
New York, NY 10022

Harley I. Lewin, Esq.
LEWIN & LAYTIN, P.C.
1776 Broadway – 15th Floor
New York, NY 10019

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 93-55961 - D.C. No. No. 93-55961

REEBOK INTERNATIONAL LIMITED
(a Massachusetts corporation) and
REEBOK INTERNATIONAL LIMITED
(a limited company of the United Kingdom),
Plaintiffs-Appellees,
v.
BYRON MCLAUGHLIN a/k/a BECK
MARKETING AGENCY a/k/a BECK
BUYING GROUP, et al., OPINION
Defendants,

and

BANQUE INTERNATIONALE A
LUXEMBOURG S.A.,
Appellant.

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

Argued and Submitted
February 8, 1995--Pasadena, California
Filed March 6, 1995

Before: Stephen S. Trott, Ferdinand F. Fernandez
and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Fernandez

SUMMARY

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Civil Litigation and Procedure/Jurisdiction/Contempt

The Court of Appeals reversed a District Court order. The court held that the district court could not hold a foreign national in contempt for actions it took in complying with an order of a court in the foreign national's own country.

Appellee Reebok International Limited sued Byron McLaughlin for violations of the Lanham Act in allegedly counterfeiting Reebok footwear. McLaughlin controlled the Heatherdale Corp. As a result of the suit, Reebok obtained a temporary restraining order (TRO) in the district court which enjoined the defendants and any persons in an active concert with them from transferring any assets of the defendants without the court's prior approval. The TRO also enjoined banks from transferring funds of the defendants which were in the banks' hands.

A copy of the TRO was served on appellant Banque Internationale a Luxembourg S.A. (BIL) in Luxembourg. BIL is a banking corporation with its principal place of business in Luxembourg. McLaughlin maintained an account with BIL (the Heatherdale account). BIL has no physical presence in California nor does it transact any banking business in the United States. BIL sent some letters to McLaughlin at his California address acknowledging the receipt of funds, and McLaughlin made several telephone calls to BIL.

McLaughlin's wife appeared at BIL's office in Luxembourg and presented the proper documentation to take control of all of the funds in the Heatherdale account. The funds were in a time deposit that had not yet matured. Although BIL would normally have honored the request for early release, it instead told McLaughlin's wife that it would retain the funds until they became due.

BIL was compelled by Luxembourg law to release funds upon proper requests from depositors. McLaughlin's wife challenged BIL's retention of the funds. BIL's in-house counsel advised BIL that McLaughlin's wife had a right to withdraw the funds because the TRO had not been properly registered as a valid judgment or as an order for attachment under Luxembourg law. BIL negotiated a compromise with McLaughlin's wife in which the funds would be transferred to a new account, but would still remain within the bank pending further legal developments.

Meanwhile, Reebok failed in its attempts to have the TRO recognized by the Luxembourg courts. McLaughlin sued BIL in Luxembourg for the right to remove his funds. The result of the suit was the Heatherdale Order, which instructed BIL to release the funds because the TRO was not legally valid in Luxembourg. BIL released approximately $2,500,000 to McLaughlin.

Reebok brought a contempt motion against BIL, contending that BIL should be held in contempt for releasing the funds with knowledge of the TRO. The district court dismissed the motion. Reebok brought a motion for reconsideration of the dismissal. The district court granted Reebok's motion for reconsideration and held BIL in contempt. The court fixed compensatory sanctions in the amount of $2,680,417.30 which presumably was payable to Reebok. BIL appealed, contending that the

district court had neither subject matter nor personal jurisdiction over it.

[1] District courts do, and must, have the authority to punish contemptuous violations of their orders. Thus, the district court did have subject matter jurisdiction to determine if its TRO had been violated.

[2] If personal jurisdiction were to exist at all in this case, it would have had to arise out of specific jurisdiction; there was no general jurisdiction over BIL.

[3] The TRO had no effect in Luxembourg because it was never registered there.

[4] BIL's duties became absolutely clear after the Heather dale Order was issued. The Heatherdale Order declared that the district court's TRO did not affect BIL's obligation to release McLaughlin's funds and required BIL to release those funds immediately. It would defy logic to decide that the district court could hold BIL in contempt for complying with the order of the Luxembourg court.

[5] Even if BIL "agreed" to the lawsuit which resulted in the Heatherdale Order, or "suggested" that McLaughlin file one, those actions could not, by themselves, subject it to the jurisdiction of the district court.

[6] Moreover, the Heatherdale court had full knowledge of the TRO's existence. The fact that Luxembourg refused to honor the district court's injunction excused BIL from having to comply with it; Reebok could not turn to the United States district court to punish BIL for complying with its own country's statutory and judicial law within that country. The injunctive power of a federal district court cannot extend that far. BIL's "violation" of the injunction

did not subject it to personal jurisdiction in California because it was under no obligation to comply in the first place.

[7] When a national of a foreign country follows the law of that country in that country, it cannot be dragged halfway around the world to answer contempt charges arising out of a foreign court's ineffective order.

[8] On balance, fairness also dictated that personal jurisdiction had to fail in this case.

[9] The contempt order could not stand.

COUNSEL

Matthew E. Digby, Marks, Murase & White, Los Angeles, California, and Lawrence M. Harnett, Marks & Murase, New York, New York, for the appellant.

Harley I. Lewin, Lewin & Laytin, New York, New York, and Bennett A. Bigman, Stein & Kahan, Santa Monica, California, for the plaintiffs-appellees.

OPINION

FERNANDEZ, Circuit Judge:

Banque Internationale a Luxembourg S.A. ("BIL") appeals the district court's orders summarily holding it in

contempt[3] and assessing sanctions against it in the amount of $2,680,417.30. BIL argues that the district court had neither subject matter nor personal jurisdiction over it. Because we agree that the district court lacked personal jurisdiction over BIL, we reverse.

BACKGROUND FACTS

Reebok International Limited brought suit against Byron McLaughlin for violations of the Lanham Act in allegedly counterfeiting Reebok footwear. Mr. McLaughlin controlled various corporations, including the Heatherdale Corporation. As a result of the lawsuit, Reebok obtained a temporary restraining order in the district court which enjoined "the defendants and their officers, servants, employees and agents and any persons in active concert or participation with them" from "transferring, disposing of, or secreting any money, stocks, or other assets of these defendants without prior approval of the court." It also enjoined banks from transferring funds of the defendants which were in the banks' hands. On November 29, 1989, a copy of the TRO was served on BIL in Luxembourg. BIL is a banking corporation with its principal place of business in Luxembourg. It has no physical presence in California nor does it transact any banking business in the United States. BIL sent some letters to Mr. McLaughlin at his address in California acknowledging the receipt of funds. Mr. McLaughlin also made several telephone calls to BIL during December 1989.

On December 6, 1989, Mr. McLaughlin's wife Brigitte--at his request--appeared at BIL's office in Luxembourg and presented the proper documentation to

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[3] *Reebok Int'l Ltd. v. McLaughlin*, 827 F. Supp. 622 (S.D. Cal. 1993) (Reebok I).

take control of all of the funds in the Heatherdale account, which amounted to approximately $2,400,000. Those funds were in a time deposit that did not mature until January 8, 1990. Although BIL would normally have honored the request for early release, it instead told Ms. McLaughlin that it would retain the funds until they became due. At that time, BIL was prohibited by Luxembourg banking secrecy laws from informing Reebok of Ms. McLaughlin's efforts to remove the funds. It was also compelled by Luxembourg law to release funds upon proper requests from depositors. Ms. McLaughlin, through Luxembourg counsel, challenged BIL's retention of the funds. BIL's in-house counsel, Jean-Jacques Rommes, advised BIL that Ms. McLaughlin had a right to withdraw the funds because the TRO had not been properly registered as a valid judgment (exequatur) or as an order for attachment (saisie-arret) under Luxembourg law.

BIL then negotiated a compromise with Ms. McLaughlin in which the funds would be transferred to a new account, but would still remain within the bank pending further legal developments--for example, the proper registration of the TRO in Luxembourg. BIL created the Bawnmore corporation and account and transferred the majority of the Heatherdale monies into that account, which was also ultimately con- trolled by Mr. McLaughlin. Later, BIL released approximately $117,000 from the Bawnmore account as interest and as part of the negotiated agreement with Mr. McLaughlin that the principal amount of the Heatherdale funds would remain at BIL.

Meanwhile, Reebok was attempting to have the TRO recognized by the Luxembourg courts. It failed in its attempt to obtain a saisie-arret, and then pursued other remedies available under articles 806 and 807 of the Luxembourg Code of Civil Procedure, which were also denied. At no time did the TRO ever become an

enforceable judgment or an attachment under Luxembourg law.

In February of 1990, Mr. McLaughlin informed BIL that he would sue in Luxembourg for the right to remove his funds. This lawsuit was known as the "Heatherdale Lawsuit." BIL made an oral opposition. The result of the suit was the "Heatherdale Order," which instructed BIL to release the funds because the TRO was not legally valid in Luxembourg. Shortly thereafter, BIL released approximately $2,500,000 to Mr. McLaughlin.

Reebok then brought a contempt motion against BIL on January 22, 1992. It contended that BIL should be held in contempt for releasing the funds with knowledge of the restraining order. On May 28, 1992, the district court dismissed Reebok's motion on grounds that BIL's actions were compelled by Luxembourg law, namely the Heatherdale Order, and BIL did not have the requisite intent for aider and abettor liability under Federal Rule of Civil Procedure 65(d).

On July 22, 1992, Reebok brought a motion for reconsideration of the dismissal based on new evidence. On April 27, 1993, the district court granted Reebok's motion for reconsideration and held BIL in contempt. Reebok I, 827 F. Supp. at 628-29. Thereafter the district court fixed compensatory sanctions in the amount of $2,680,417.30, which presumably were payable to Reebok, although the order did not explicitly say so. This appeal ensued.

JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. S 1291.

The existence of subject matter jurisdiction is a question of law reviewed de novo. *See Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994).

A district court's determination that personal jurisdiction can properly be exercised is a question of law reviewable de novo when the underlying facts are not disputed. *See Bourassa v. Desrochers*, 938 F.2d 1056, 1057 (9th Cir. 1991). The district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous. *See Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990).

A district court's civil contempt order is reviewed for an abuse of discretion. *See In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). A district court's decision to impose sanctions or punishment for contempt is also reviewed for abuse of discretion. *See Securities and Exch. Comm'n v. International Swiss Invs. Corp.*, 895 F.2d 1272, 1277 (9th Cir. 1990).

DISCUSSION

When all is said and done, the resolution of this case turns on jurisdictional issues. BIL asserts that the district court had neither subject matter nor personal jurisdiction over it. We disagree with the former assertion but find merit in the latter one.

A. Subject Matter Jurisdiction

BIL argues that the district court should not have exercised subject matter jurisdiction over its actions in Luxembourg under the "jurisdictional rule of reason" articulated in *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976). However, in that case we were not deciding the nature of a district court's subject matter jurisdiction over its own orders. Rather, we determined whether United States antitrust laws may be applied to actions occurring in other nations, and in so doing listed several factors to be considered.[4]

The Timberlane factors are generally used to analyze whether a particular United States law may bind parties acting in other nations. For example, this Court has held that the Lanham Act may properly be applied to foreign defendants' activities outside the United States. *See Reebok Int'l, Ltd. v. Marnatech Enters.*, 970 F.2d 552, 554-557 (9th Cir. 1992).

[1] Those authorities do not lend support to BIL's claim that the district court had no subject matter jurisdiction in this case. District courts do, and must, have the authority to punish contemptuous violations of their orders. 18 U.S.C.S 401. *See also International Union, United Mine*

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[4]The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Timberlane, 549 F.2d at 614.

Workers v. Bagwell, _____ U.S. _____, 114 S. Ct. 2552, 2559, 129 L. Ed. 2d 642 (1994) (noting that "[c]ourts independently must be vested with `power to impose ... submission to their lawful mandates ...'" and thus have "an inherent contempt authority") (citation omitted); cf. *Republic of the Phil. v. Westinghouse Elec. Corp.*, 43 F.3d 65, 72-80 (3d Cir. 1994) (where foreign government was a party, district court could impose sanctions upon it, but comity precluded injunctive relief). Thus, the district court did have subject matter jurisdiction to determine if its TRO had been violated.

B. Personal Jurisdiction

BIL next argues that it could not be held in contempt because the district court did not have personal jurisdiction over it. For a defendant to be subject to general in personam jurisdiction, it must have such continuous and systematic contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *See Core-Vent Corp. v. Nobel Indus.* AB, 11 F.3d 1482, 1485 (9th Cir. 1993). If a defendant's contacts with the forum are not continuous and systematic, the forum may exercise only specific jurisdiction, which is determined by the following three-part test:

> (1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

Core-Vent, 11 F.3d at 1485.

[2] The district court's order properly indicated that "personal jurisdiction, if it exists at all, arises out of specific jurisdiction, as clearly there is no general jurisdiction over BIL." Reebok I, 827 F. Supp. at 624.[5] It went on to note that "it would not be appropriate to say that BIL does business in California, or in the United States for that matter...." *Id.* The district court mentioned that BIL "does accept money from citizens of this country and of this state." *Id.* But the court found that the "essential contact" giving rise to personal jurisdiction was BIL's conduct in "assisting" Mr. McLaughlin's violation of the injunction. *Id.*

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[5]Hence, the district court recognized that this is not a case concerning the failure of a foreign bank with United States branches to comply with a federal district court's orders. Cf. *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982) (permitting federal district court to hold in contempt a foreign bank with a Miami, Florida office for failing to comply with subpoena duces tecum directed at documents located at the bank's Bahamas branch, compliance with which would subject the bank to criminal sanctions in the Bahamas), cert. denied, 462 U.S. 1119, 103 S. Ct. 3086, 77 L. Ed. 2d 1348 (1983); *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984) (affirming order of contempt and $25,000 per day fines in a case where noncomplying foreign bank had not produced documents requested in a subpoena duces tecum served on bank's Miami, Florida office), cert. denied, 469 U.S. 1106, 105 S. Ct. 778, 83 L. Ed. 2d 774 (1985).

at 624. It then found that "to the extent that minimum contacts are required, personal jurisdiction over a non-party in a case such as this one may [be] found by construing the non-party's act of assisting in the violation of an injunction as a `super-contact.'" *Id.*

In finding this "super-contact," the district court relied on the Fifth Circuit's decision in *Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir. 1985), *cert. denied*, 474 U.S. 1056, 106 S. Ct. 794, 88 L. Ed. 2d 771 (1986). In that case, the Fifth Circuit found that "[n]onparties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order." *Id.* The Fifth Circuit based its decision on both the inherent authority of a court to enforce its injunctions and the idea that a knowing violation of an injunction would make litigation in the forum that issued it foreseeable, and therefore within the notions of fair play and substantial justice. *See id.* at 716-18, 721-23; Fed. R. Civ. P. 65(d). Although *Waffenschmidt* speaks in expansive terms, it was speaking about the authority of district courts within the United States. The court grounded its decision on the simple fact that the "mandate of an injunction issued by a federal district court runs nationwide...." *Id.* at 716. That being so, the court could hold enjoined parties in contempt, no matter in what state they violated the court's orders. *Id.* As the court went on to say: "The nationwide scope of an injunction carries with it the concomitant power of the court to reach out to nonparties who knowingly violate its orders." *Id.* at 717. Once the court accepted that proposition, it is not surprising that it determined that a national court which could issue nationwide orders could also reach out and enforce those orders on a nationwide basis by taking personal jurisdiction over violators. Of course, in *Waffenschmidt* the individuals held in contempt

had accepted assets from the enjoined party after they knew that he was enjoined from transferring those assets. *Id.* at 723.

[3] A finding of personal jurisdiction over the violators in that instance may be sound, even necessary. But the strength of the analysis begins to crumble when a district court seeks to reach out across the Atlantic in an attempt to impose conflicting duties on another country's nationals within its own borders. It is a general principle that one state cannot require a person "to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national," nor can the person be required to refrain from an act that is required. Restatement (Third) of the Foreign Relations Law of the United States S 441(1)(a) (1987). Cf. *In re Establishment Inspection of Hern Iron Works*, 881 F.2d 722, 726 n.11 (9th Cir. 1989) ("The invalidity of the underlying order is always a defense to a civil contempt charge."). The record demonstrates that Luxembourg banking law[6] normally compels both the release of depositors' funds on demand and strict secrecy regarding bank accounts. At the very least, those banking laws meant that BIL was subjected to conflicting legal demands, but that would assume that the TRO had some force in Luxembourg. In fact, however, the TRO had no effect in Luxembourg because it was never registered there.

Unless recognized by the Luxembourg government, foreign judgments do not have any force in that country.

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[6]Matters of foreign law may be determined by the court, which may consider any relevant material or source, including testimony. *See* Fed. R. Civ. P. 44.1; *Stuart v. United States*, 813 F.2d 243, 250-51 (9th Cir. 1987), *rev'd on other grounds*, 489 U.S. 353, 109 S. Ct. 1183, 103 L. Ed. 2d 388 (1989).

Reebok's own Luxembourg law expert, Andre Marc, testified that the TRO "was not an enforceable title in Luxembourg. " Cf. *Hilton v. Guyot*, 159 U.S. 113, 227, 16 S. Ct. 139, 168, 40 L. Ed. 95 (1895) ("[J]udgments rendered ... in ... [a] foreign country ... are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim."). Reebok tried to have its TRO recognized under the laws of Luxembourg but was ultimately unsuccessful. We are not sure of where Reebok's attempts went awry, but it appears that the Luxembourg courts were not satisfied that the temporary restraining order reflected a judgment or a claim that was certain and due. Without an enforceable order, Reebok had no business crying foul over any steps BIL took to avoid turning over all of Mr. McLaughlin's funds immediately upon demand. BIL explains that its reasons for setting up the "Bawnmore" account were to try to honor Mr. McLaughlin's rights under Luxembourg law and to try to give some deference to the TRO at the same time. The new account, and the $117,000 release, were sub- tended by BIL's attempt to keep control of the principal of the Heatherdale funds until the TRO's status became definite under Luxembourg law. If its explanation is correct, BIL went above and beyond the call of duty when it tried to buy time from Mr. McLaughlin despite its own obligations under Luxembourg law. Even if the explanation is not accepted, no force was added to the TRO as a result.

[4] In any event, BIL's duties became absolutely clear after the "Heatherdale Order" was issued. That order declared that the district court's TRO did not affect BIL's obligation to release Mr. McLaughlin's funds and required BIL to release those funds immediately. It would defy logic were we to decide that the district court could hold BIL in contempt for complying with the order of the Luxembourg

court. The district court, however, found that BIL had somehow colluded with Mr. McLaughlin in bringing a sham lawsuit which resulted in the Heatherdale Order. That, the court thought, effectively avoided the injunction's mandate because a court order was obtained which instructed BIL to do exactly the opposite of what the TRO commanded.

[5] In so deciding, the district court first looked at correspondence between Mr. McLaughlin and his lawyer: "'As to the suit that HEATHERDALE was to bring against the Bank, Mr. Rommes [BIL's in-house counsel] agrees to it.'" Reebok I, 827 F. Supp. at 627. The court noted that this evidence could be viewed in two ways: either BIL was trying to appease Mr. McLaughlin by telling him that he would need a court order before it would release his funds, or BIL actively suggested that Mr. McLaughlin proceed to a Luxembourg court to obtain an order as a way of minimizing BIL's liability. The district court chose the latter version. We fail to see the significance of either reading. The TRO was still not registered in Luxembourg. Given that situation, it was reasonable for BIL to want a lawsuit brought to determine its obligations once and for all. Even if BIL "agreed" to the lawsuit, or "suggested" that Mr. McLaughlin file one, those actions could not, by themselves, subject it to the jurisdiction of the district court. There could be nothing wrong in advising Mr. McLaughlin that he must follow the law in Luxembourg if he wanted his money. Indeed, Reebok should have understood that it had to do the same thing, if it wanted to keep the money from him.

[6] The district court also found that, during the Heatherdale lawsuit, BIL "remained silent,"[7] which allowed Mr.

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[7]The district court apparently concentrated on the fact that BIL (continued...)

McLaughlin to convince the Luxembourg court that the release of the funds would be appropriate. The district court found that BIL should have "at a minimum, informed the Luxembourg court of the United States order ... and given the Luxembourg court the opportunity to order the release of the funds with full knowledge of the facts." *Id.* at 628. But it is undisputable that the Heatherdale court had full knowledge of the TRO's existence. The Heatherdale Order specifically stated:

> B.I.L. has been served a temporary restraining order issued by a California court on November 27, 1989 prohibiting all banks and generally any other financial institutions from releasing the funds held by HEATHERDALE CORPORATION.
>
> . . .
>
> Since the measures taken abroad against HEATHER-DALE CORPORATION have only a territorial effect and since the opposition served on B.I.L. was not done in the form of a proper attachment, supported by a title enforceable in Luxembourg or the permission of a Luxembourg judge, they cannot be considered valid or effective....

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[7](...continued)
did not file a written opposition to the Heatherdale lawsuit. However, BIL points out that, under Luxembourg law, the Heatherdale lawsuit was a summary proceeding primarily oral in nature. Proceedings of that nature are far from unknown in the courts of this country. Indeed, they are common. The lack of a written submission should not have been of any consequence. In any event, BIL clearly did not "remain silent," even if it did have a duty to respond, which is questionable.

> Therefore, B.I.L.'s blockage of the account must be considered improper....

As can be seen from the language of the Heatherdale Order, the district court's finding that BIL's act of "hiding" the TRO from the Luxembourg court subjected it to personal jurisdiction was clearly erroneous. The Heatherdale Order was issued with full knowledge of both the TRO and its ineffectiveness under Luxembourg law. The fact that Luxembourg refused to honor the district court's injunction excused BIL from having to comply with it; Reebok cannot now turn to the United States district court to punish BIL for complying with its own country's statutory and judicial law within that country. The injunctive power of a federal district court cannot extend that far. BIL's "violation" of the injunction did not subject it to personal jurisdiction in California because it was under no obligation to comply in the first place.[8]

[7] In fine, we do not agree that when a national of a foreign country follows the law of that country in that country it can be dragged halfway around the world to answer contempt charges arising out of a foreign court's ineffective order. But, at the risk of being unduly repetitious, we will put our discussion into the more traditional terms outlined in *Core-Vent*, 11 F.3d at 1485.[9]

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[8]Because we hold that there was no personal jurisdiction, we do not consider whether the lack of an evidentiary hearing violated BIL's due process rights.

[9]Where there is no federal statute governing personal jurisdiction, we look to the law of the state in which the district court sits. *Core-Vent*, 11 F.3d at 1484. Here, as in *Core-Vent*, Reebok brought its case in a federal district court sitting in California. California's long-arm statute allows courts to exercise personal jurisdiction to the

(continued...)

A national of a foreign country--BIL--followed the law, including a court order, of its own country--Luxembourg--when it did acts within that country. It did that rather than following an order from a court of another country--the United States--which had no legal effect in Luxembourg. Can it be said that BIL has purposefully directed its activities toward the United States? *Id.* at 1485-87. To ask the question is to answer it and to do so in the negative. It is pellucid that BIL has simply behaved as any rational law-abiding person would. It has obeyed the only law applicable to it--the law of its sovereign. If that can be said to have had an effect in the United States, it still cannot be said that the action was purposefully directed toward the United States. At least that cannot be said without wrenching language out of its normal channel and distorting meaning beyond measure. Nor can we say that the fact that BIL had calls and contacts with its depositor, who was demanding the deposited funds, makes one whit of difference. Nor do we see anything sinister in the fact that the Heatherdale Order was obtained without notice to Reebok, even though the parties and the Luxembourg court knew that Reebok had more than a passing (though not legally recognized) interest in the litigation. For a variety of reasons, courts do not always proceed slowly and with widespread notice. After all, the TRO for which Reebok seeks an international reach was based upon a sealed file and was obtained ex parte without notice to anyone at all.

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[9](...continued)
extent permitted by the Due Process Clause of the United States Constitution. Thus we need only determine whether the district court's exercise of personal jurisdiction over BIL meets the requirements of due process. *Id.*; cf. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 414-16 (9th Cir. 1977) (applying Nevada "long-arm" personal jurisdiction statute to Liechtenstein national accused of violating the Lanham Act).

It follows that it cannot be said that a contempt claim for not following the TRO could be said to be connected to BIL's forum-related activities. *Id.* at 1485.

[8] Finally, it could not be said that under these circumstances bringing BIL across the sea to answer for its conduct in its own land would "`comport with fair play and substantial justice....'" *Id.* (citation omitted). In *Core-Vent* we outlined the factors that support that determination. *Id.* at 1487-90. We will touch on them now. BIL's injection into the affairs of the United States was nil, the burden on BIL would be very great under the circumstances, and the conflict with the sovereignty of Luxembourg could hardly be more sharp. BIL would be mulcted for more than $2,680,000 for obeying the law of Luxembourg. What state could tolerate that? Going on with the list of traditional factors, we cannot deny that the issuing court has an interest in adjudicating the dispute, though we say that with some hesitation given the facts of the case. Undoubtedly the district court would be an efficient place to decide the contempt issue, and is probably the only place where it could be litigated. On the other hand, if Reebok truly thinks that BIL did not properly adhere to the law of Luxembourg when the funds were released to Mr. McLaughlin, it can, no doubt, raise the issue there. That is the country where all of the relevant events took place. Thus, on balance, fairness also dictates that personal jurisdiction must fail in this case.

CONCLUSION

As federal judges we can readily sympathize with the district court's desire to have its injunctive order respected. We, like it, do not readily embrace the idea that the power of the United States courts can be thwarted; indeed, we embrace that reality with velleity. We also sympathize with

Reebok's desire to keep an infringer from his ill-gotten gains. Nevertheless, there are limits to the district court's reach, and those limits became palpable when the court sought to extend its arm into the territory of another nation and to impose discordant duties upon the subjects of that nation whose actions were solely within its own borders.

There can be no doubt that Luxembourg both imposed legal duties upon BIL and refused to recognize the TRO, even though the Luxembourg courts were well aware of that TRO's existence. As a matter of fact, those courts had specifically rebuffed Reebok's attempts to vitalize the TRO within that nation's borders. We do not stop to decide whether the failure to register can be laid entirely at the feet of Reebok; it just does not matter. The Luxembourg courts also ordered BIL to follow Luxembourg law and to release the funds. When BIL obeyed those orders of a court of its own nation, it did not thereby subject itself to the personal jurisdiction of the district court.

[9] On the facts of this case, we cannot arrogate to the federal courts the power to control the banking systems of other countries within their own territory. Again, we understand the district court's frustration and its reaction in the heat of the fray. But from our more remote coign of vantage it is clear that the contempt order cannot stand.

REVERSED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No: CV-89-01739-GT
No. 93-55961

REEBOK INTERNATIONAL LIMITED,
Plaintiff-Appellee

v.

BANQUE INTERNATIONALE A
LUXEMBOURG S.A.
Appellant

v.

BYRON McLAUGHLIN
Defendant.

ORDER DENYING PETITION FOR REHEARING
AND REJECTING SUGGESTION FOR REHEARING
EN BANC

Before: TROTT, FERNANDEZ, and T.G. NELSON, Circuit Judges

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Filed: April 19, 1995
Cathy A. Catterson, Clerk - U.S. Court of Appeals

No. 95-85 (2)

Supreme Court, U.S.
FILED
AUG 18 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

REEBOK INTERNATIONAL LTD. and
REEBOK INTERNATIONAL LIMITED,

Petitioners,

v.

BANQUE INTERNATIONALE
A LUXEMBOURG S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE M. HARNETT
Counsel of Record

DIANE C. HERTZ
MARKS & MURASE L.L.P.
399 Park Avenue
New York, New York 10022
(212) 318-7700

Counsel for Respondent
Banque Internationale
a Luxembourg S.A.

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the District Court exceeded its powers when it held a foreign bank, not a party to the United States court proceeding and not otherwise subject to personal jurisdiction in the forum, in contempt for aiding and abetting a violation of an injunction by engaging in conduct solely in its own country which was required by the laws of that country.

LIST OF INTERESTED PARTIES

Respondent, Banque Internationale a Luxembourg S.A. ("BIL"), is a Luxembourg banking corporation, with its principal place of business in Luxembourg. The parent companies and subsidiaries (except wholly owned subsidiaries) of BIL are listed below:

1. *Parent Company*
   Crédit Communal de Belgique, Bruxelles

2. *Subsidiaries*
   Abecor, Bruxelles
   Aerochange Sàrl, Luxembourg
   Aurea Finance Company, Luxembourg
   Ares S.A., Luxembourg
   Banque Bruxelles Lambert, Bruxelles
   Belfox, Bruxelles
   Bil-Vie S.A., Luxembourg
   Bourse de Luxembourg, Luxembourg
   Cedel Bank, Luxembourg
   Cegedel, Luxembourg
   Centrale de Communications Luxembourg, Luxembourg
   Cetrel, Luxembourg
   Euro Pacific Advisors, Hong Kong
   Euro-Trav-Ecu, Bruxelles
   Europay Luxembourg, Luxembourg
   Exor, Luxembourg
   Immo Croissance Conseil, Luxembourg
   Intercalux S.A., Luxembourg
   Luxair Executive S.A., Luxembourg
   Luxair, Luxembourg
   Luxconsult S.A., Luxembourg
   Paneurolife S.A., Luxembourg
   Port Fluvial Mertert, Luxembourg

Serie S.A., Luxembourg
Shipping Transport Insurance Management (STIM), Luxembourg
Soporgest, Luxembourg
Société Immobilière du Parc des Expositions de Luxembourg, Luxembourg
Société Internationale des Foires de Luxembourg, Luxembourg
Société Royal Rome, Luxembourg
Swift, Bruxelles
Visalux S.A., Luxembourg
Luxempart, Luxembourg

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No. 95-85

In The

Supreme Court of the United States

October Term, 1995

REEBOK INTERNATIONAL LTD. and
REEBOK INTERNATIONAL LIMITED,

Petitioners,

v.

BANQUE INTERNATIONALE A
LUXEMBOURG S.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Banque Internationale a Luxembourg S.A. ("BIL" or the "Banque"), respectfully requests that this Court deny the Petition for a Writ of Certiorari submitted by Petitioners Reebok International Ltd. and Reebok International Limited (collectively "Petitioner" or "Reebok"). As discussed in the Argument section below, the decision of the United States Court of Appeals for the Ninth

Circuit from which review is sought presents no conflict with decisions of any other United States Court of Appeals or of this Court. Moreover, the Ninth Circuit's holding that it would be fundamentally unfair to subject BIL to personal jurisdiction in the California forum was the result of a careful analysis limited to the unique facts presented in this case. Accordingly, the Petition raises no issues worthy of this Court's review.

OPINIONS BELOW

The opinion of the Ninth Circuit unanimously reversing the contempt finding against BIL by the United States District Court for the Southern District of California is reported at 49 F.3d 1387 (9th Cir. 1995) and is reproduced in Petitioner's Appendix ("App.") at 42a-62a. The Order of the Ninth Circuit unanimously denying Reebok's petition for rehearing and its suggestion for rehearing en banc is not reported, but is reproduced in Petitioner's Appendix at 63a.

The opinion of the District Court dismissing Reebok's contempt motion against BIL is not reported, but is reproduced in Petitioner's Appendix at 1a-17a. The opinion of the District Court granting Reebok's motion for contempt against BIL upon reconsideration is reported at 827 F. Supp. 622 (S.D. Cal. 1993) and is reproduced in Petitioner's Appendix at 18a-33a. The opinion of the District Court fixing sanctions against BIL in the total amount of $2,680,417.30 is not reported, but is reproduced in Petitioner's Appendix at 34a-41a.

STATEMENT OF JURISDICTION

The opinion and judgment of the Ninth Circuit dismissing the contempt claim against BIL were entered on

March 6, 1995. App. at 42a. The order denying Reebok's Petition for Rehearing and rejecting the suggestion for rehearing en banc was entered on April 19, 1995. App. at 63a. Reebok invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the Ninth Circuit was invoked pursuant to 28 U.S.C. § 1291 as an appeal of right from the final order of the District Court imposing contempt sanctions against BIL. The jurisdiction of the District Court was based upon 28 U.S.C. §§ 1331 and 1338(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, *inter alia*, the question of whether the District Court's exercise of personal jurisdiction over BIL met the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves the permissible reach of a District Court's injunctive powers pursuant to Fed. R. Civ. P. 65(d), which provides as follows:

> Every order granting an injunction and every restraining order shall set forth the

> reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

STATEMENT OF THE CASE

A. Factual Background

On or about November 29, 1989 BIL, a Luxembourg bank having no presence in the State of California and doing no banking business anywhere in the United States, received a copy of a temporary restraining order issued by the United States District Court for the Southern District of California (the "Restraining Order") enjoining defendant Byron McLaughlin ("McLaughlin") and several companies controlled by him from transferring or disposing of certain assets, including bank deposits.[1] App. at 47a. At the time that BIL received a copy of the Restraining Order, one of McLaughlin's companies, Heatherdale Corporation ("Heatherdale"), had approximately $2.4 million on deposit with BIL in Luxembourg. App. at 48a.

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[1] The Petitioner incorrectly states that BIL "provided banking services to McLaughlin in California." Petition at 4 n.3. In fact, the record is clear that BIL did not do business in California. It merely accepted funds from McLaughlin in Luxembourg and sent a few letters to McLaughlin at his address in California acknowledging receipt of those funds. App. at 47a, 53a.

On December 6, 1989 McLaughlin's wife, Brigitte McLaughlin, appeared at BIL's office in Luxembourg at McLaughlin's request and presented all documents required by Luxembourg law to take control of the funds in the Heatherdale account. While those funds were in a time deposit that did not mature until January 8, 1990, BIL would normally have honored the McLaughlins' demand for early release. App. at 47a-48a.

But BIL did not regard this as the normal situation. Even though it knew the Restraining Order had no force in Luxembourg because it had not been recognized by a Luxembourg court, BIL wanted to protect the interests implicated by the Order. However, Luxembourg law provided significant constraints on what BIL could do. App. at 48a; Ex.R. at 27-29.[2]

BIL was prohibited under Luxembourg banking secrecy laws from informing Reebok, the United States District Court or any other person of the McLaughlins' demand to withdraw the funds. It also could not simply ignore the demand because of the strict obligations a bank has to honor proper customer demands under Luxembourg law. Accordingly, in an effort to keep the funds at the Banque, BIL did the one thing it was technically entitled to do: it told Ms. McLaughlin that it would retain the funds until the time deposit matured. App. at 48a; Ex.R. at 25-29.

Ms. McLaughlin, through Luxembourg counsel, promptly challenged BIL's right to withhold the funds, stating that if BIL were basing its decision on the Restraining Order, it was knowingly acting contrary to Luxembourg law. The

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[2] "Ex.R." refers to the Excerpts of Record filed by BIL in the Court of Appeals on November 6, 1993.

head of BIL's Legal Department, Mr. Jean-Jacques Rommes, advised BIL that the McLaughlins' counsel was correct. While Luxembourg has well-recognized procedures under which a foreign court order can be formally recognized as a Luxembourg court order (the exequatur procedure), or provide the basis for a Luxembourg order of attachment (the saisie-arret procedure), such a decree had not been obtained with respect to the Restraining Order. As a result, that Order had no legal force and effect under Luxembourg law. App. at 48a-49a.

Thus, BIL could have paid out the funds immediately. But, in an effort to protect all interests, BIL used the limited leverage of the time deposit to negotiate a compromise whereby BIL agreed to move funds out of the Heatherdale account in return for the McLaughlins' agreement to keep the principal portion of the funds in another McLaughlin-controlled account at BIL pending further legal developments. Pursuant to this compromise, BIL complied with the McLaughlins' demands to transfer the funds into Ms. McLaughlin's account, to form the Bawnmore corporation, and then to transfer the funds into the Bawnmore account. At all times, therefore, the principal balance of the funds remained at BIL in accounts controlled by McLaughlin, and only $117,000, consisting primarily of accrued interest, was released. App. at 48a.

By this compromise, BIL ensured that if Reebok took the steps required to give the Restraining Order legal force and effect under Luxembourg law, the funds would still be at the Banque and available to Reebok. As Ms. McLaughlin acknowledged, BIL also advised the McLaughlins that it would *not* protect or "cover" for them if a Luxembourg court issued an order regarding the funds. Ex.R. at 134.

While BIL thus retained the McLaughlin funds, Reebok never took the proper steps to obtain a court order in Luxembourg to freeze or obtain them. App. at 48a. Significantly, Reebok never pursued the exequatur procedure under which the Restraining Order could have been given formal legal recognition as a Luxembourg court order. App. at 48a; Ex.R. at 104-05.

Moreover, when Reebok sought a unilateral order of attachment through the saisie-arret procedure, it inexplicably failed to make the necessary evidentiary showing to permit such relief, prompting its own Luxembourg counsel to complain that Reebok's showing was "too general at this stage." Ex.R. at 94, 152-53. While Reebok could have filed an expedited appeal from the denial of its application, and introduced new evidence on that appeal, Reebok did not do so. Ex.R. at 153-54.

Instead, Reebok brought another proceeding seeking a provisional injunction against BIL. Because this was not the appropriate way to obtain formal recognition of the Restraining Order, or to attach funds based upon that Order, the Luxembourg court dismissed Reebok's application as defective on January 22, 1990. Ex.R. at 35-39; App. at 48a. At that point, all legal efforts by Reebok in Luxembourg came to an end. As a result, the Restraining Order *never* had any legal force and effect in Luxembourg, a fact that even Reebok's own Luxembourg law expert acknowledged. App. at 55a-56a.

Then, after BIL failed to comply with McLaughlin's repeated demands for the funds, on or about March 2, 1990, Heatherdale sued BIL in the Luxembourg District Court, seeking an order compelling BIL to honor all transfer and withdrawal demands. Heatherdale argued that since the Restraining Order had not been recognized by a Luxembourg

court, BIL had no legal basis to refuse its customer's demands. BIL argued in opposition that it was in a difficult position because it was aware of the Restraining Order, but was also aware that such Order was not enforceable in Luxembourg.[3] App. at 49a; Ex.R. at 31.

On April 24, 1990 the Luxembourg court issued an order in favor of Heatherdale (the "*Heatherdale* Order"), holding that the Restraining Order had no force in Luxembourg and that BIL was absolutely required to honor its customer's demands. The *Heatherdale* Order provides in relevant part:

> B.I.L. has been served a temporary restraining order issued by a California court on November 27, 1989 prohibiting all banks and generally any other financial institutions from releasing the funds held by HEATHERDALE CORPORATION.
>
> . . . .
>
> Since the measures taken abroad against HEATHERDALE CORPORATION have only a territorial effect and since the opposition served on B.I.L. was not done in the form of a proper attachment, supported by a title enforceable in Luxembourg or the permission of a Luxembourg judge, they cannot be considered valid or effective. . . .

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[3] While BIL could make limited disclosures to the *Heatherdale* court necessary to defend itself, the Luxembourg bank secrecy laws were not waived, and contrary to Reebok's suggestion (Petition at 6) BIL was still prohibited from disclosing anything about the *Heatherdale* action to Reebok or the District Court. Ex.R. at 147, 156-57.

> Therefore, B.I.L.'s blockage of the account must be considered improper. . . .

App. at 58a-59a.

Shortly after the *Heatherdale* Order issued, BIL honored McLaughlin's demands and released approximately $2.5 million. App. at 49a.

B. The Proceedings Below

On January 22, 1992 Reebok brought a contempt motion against BIL in the District Court, arguing that when BIL released the funds with knowledge of the Restraining Order, it became an aider and abettor of McLaughlin's contempt pursuant to Fed. R. Civ. P. 65(d) and, as a consequence, was automatically subject to personal jurisdiction in the California forum. On May 28, 1992 the District Court, without reaching the jurisdictional issue, dismissed the contempt motion because (1) BIL was compelled by Luxembourg law — specifically the *Heatherdale* Order — to release the funds, and (2) BIL did not commit the requisite voluntary act or have the requisite intent for aider and abettor liability under Rule 65(d). App. at 9a-14a, 49a.

On July 2, 1992 Reebok moved for reconsideration, and was thereafter permitted to take discovery from BIL. On April 27, 1993 the District Court granted Reebok's motion for reconsideration and summarily held BIL in contempt. App. at 18a-33a, 49a. By Order dated June 14, 1993 the District Court assessed sanctions against BIL in the amount of $2,680,417.30. App. at 34a-41a, 49a.

The District Court's contempt finding on reconsideration was based upon the erroneous conclusion that BIL had failed

to inform the *Heatherdale* court in Luxembourg of the existence of the Restraining Order and that court, therefore, directed BIL to release the funds without knowledge of the Restraining Order. App. at 31a, 38a, 58a-59a. In reliance upon this fundamental misapprehension of fact, the District Court concluded that the compulsory effect of the *Heatherdale* Order should now be disregarded and, once disregarded, BIL should be deemed to have assisted McLaughlin in the violation of the Restraining Order. *Id.*

The District Court also held that BIL was subject to personal jurisdiction in California despite an express finding that BIL did not do business in California or anywhere in the United States. Relying upon *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986), the court found jurisdiction on the theory that BIL's supposed act of assisting McLaughlin in the violation of the Restraining Order constituted a "super-contact" with the California forum so that there were sufficient minimum contacts to satisfy the requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). App. at 21a-22a, 53a-54a.

On March 6, 1995 the Court of Appeals unanimously reversed the District Court and dismissed the contempt charge against BIL. The Court of Appeals held that it would be fundamentally unfair and constitute a deprivation of due process to subject BIL to personal jurisdiction in California for having engaged in conduct in Luxembourg that was required by Luxembourg law. App. at 55a-56a, 59a-62a.

As an integral part of its fairness analysis, the Court of Appeals also concluded that the District Court's central factual finding — that the *Heatherdale* court did not know about the District Court's Restraining Order — was clearly erroneous, stating "[t]he Heatherdale Order was issued with

full knowledge of both the TRO and its ineffectiveness under Luxembourg law." App. at 59a. As a consequence, the Court of Appeals determined that the *Heatherdale* court's finding that the Restraining Order had no legal force in Luxembourg "excused BIL from having to comply with it." *Id.*

ARGUMENT – REASONS FOR DENYING THE WRIT

The only "Question Presented" by Reebok in its Petition is

> Whether a federal district court's inherent powers to enforce its injunctions reaches extraterritorially to prevent non-parties from committing acts outside the United States which aid and abet a party in violating the injunction.

Petition at i.

This, however, was not the question decided by the Court of Appeals in the present case. The question decided by the Court of Appeals was whether BIL, a nonparty Luxembourg bank *not otherwise subject to jurisdiction* in California, could be held in contempt for engaging in conduct in Luxembourg that was *required by Luxembourg law.* After careful analysis of the factual record, the Court of Appeals answered this question in the negative.

By challenging the Court of Appeals' decision in its Petition, Reebok is asking this Court to proclaim a new rule of law that United States court injunctions are binding upon every person in the world who has notice of them, irrespective of whether that person has any contacts with the United States forum and irrespective of whether that person has conflicting

obligations imposed by its own domestic law. There is no good reason for this Court to accept the Petitioner's invitation to create such an expansive rule and every good reason not to do so.

I.

NONE OF THE THREE REASONS ADVANCED BY THE PETITIONER SUPPORTS REVIEW OF THE DECISION BELOW.

A. The Ninth Circuit's Decision Does Not Conflict With Decisions of the Fifth Circuit or This Court.

The Petitioner argues that the Ninth Circuit's decision conflicts with the decision of the Fifth Circuit in *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986) and with certain decisions of this Court. The Petitioner could not be more mistaken.

In *Waffenschmidt*, the Fifth Circuit affirmed an order holding that certain nonparty Texas residents were subject to personal jurisdiction in a contempt proceeding in Mississippi because they aided and abetted the Mississippi defendant's violation of an injunction by accepting assets from the defendant which they knew were subject to the injunction. The Fifth Circuit concluded that jurisdiction over the nonparties was proper because of the inherent authority of a court to enforce its injunctions and because a knowing violation of an injunction would make litigation in the forum that issued it reasonably foreseeable. *Id.* at 716-18, 721-23. The court grounded its decision on the fact that the "mandate of an injunction issued by a federal district court runs nationwide", *Id.* at 716, and, therefore, the "nationwide scope of an injunction carries with it the concomitant power of the court to reach out to nonparties who knowingly violate its orders." *Id.* at 717.

The Ninth Circuit readily concluded that the *Waffenschmidt* rationale had no application to the facts of this case:

> [I]t is not surprising that [the *Waffenschmidt* court] determined that a national court which could issue nationwide orders could also reach out and enforce those orders on a nationwide basis by taking personal jurisdiction over violators. Of course, in *Waffenschmidt* the individuals held in contempt had accepted assets from the enjoined party after they knew that he was enjoined from transferring those assets. *Id.* at 723.
>
> A finding of personal jurisdiction over the violators in that instance may be sound, even necessary. But the strength of the analysis begins to crumble when a district court seeks to reach out across the Atlantic in an attempt to impose conflicting duties on another country's nationals within its own borders.

App. at 54a-55a.

Unlike the nonparties in *Waffenschmidt*: (i) BIL was a foreign national, acting on foreign soil; (ii) BIL was acting in a jurisdiction (Luxembourg) where the Restraining Order had no legal force and effect; (iii) BIL was compelled by the law of Luxembourg to engage in conduct that was prohibited by the terms of the Restraining Order; (iv) BIL was prevented under Luxembourg bank secrecy laws from seeking clarification from the District Court as to the intended reach

of the Restraining Order; and (v) BIL did not assist in removing the restrained funds from the forum since the funds had been deposited with BIL in Luxembourg long before the Restraining Order issued. App. at 47a-49a, 55a.

The Court of Appeals correctly held that any effort to export the *Waffenschmidt* test to the international arena on the particular facts of this case would violate fundamental principles of due process. App. at 55a, 59-61a, *citing Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482 (9th Cir. 1993). In short, the Ninth Circuit's decision is not even remotely in conflict with the Fifth Circuit's decision in *Waffenschmidt*.[4]

The Ninth Circuit's decision also is not in conflict with any decisions of this Court. The decisions in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) and *United States v. First National City Bank*, 379 U.S. 378 (1965), upon which the Petitioner relies (Petition at 11), merely stand for the proposition that a district court has the authority to enjoin conduct and freeze assets of a *party* outside the United States so long as personal jurisdiction has *already* been obtained over that party. *See Steele*, 344 U.S. at 281, 289; *First National City Bank*, 379 U.S. at 384.

Of course, BIL was not a party to the District Court proceeding and, as the Ninth Circuit found, the District Court

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[4] Petitioner suggests that the *Waffenschmidt* court's citation to *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932) confirms that the *Waffenschmidt* test for jurisdiction over nonparties was not intended to be limited to the United States. Petition at 10-11. Incredibly, Petitioner fails to inform the Court that the respondent in *Leman* was a U.S. resident party, not a foreign nonparty, and that only three sentences above the portion of the *Leman* decision quoted by Petitioner, the Court stated that "[t]he decree was binding upon the respondent, not simply within the District of Massachusetts, but throughout the United States." *Id.* at 451.

did not — indeed, could not — have jurisdiction over BIL at the time that it issued the Restraining Order. App. at 53a-56a.

Moreover, in both *Steele* and *First National City Bank*, this Court expressly found that the enforcement of the district court's injunctions against extraterritorial conduct of the parties in those cases would *not* present any conflict with foreign law. *See Steele*, 344 U.S. at 289; *First National City Bank*, 379 U.S. at 384. By contrast, the Ninth Circuit expressly found that the prohibitions in the Restraining Order presented a direct conflict with the obligations imposed upon BIL under Luxembourg law. App. at 55a-56a, 61a. In short, the decisions of this Court relied upon by Reebok present no conflict whatsoever with the Ninth Circuit's decision.

Finally, Petitioner argues that the Court of Appeals created a "*per se* rule that a court's injunctive powers as to non-party aiders and abettors terminate at the borders of the United States" and that this rule "does not foster international comity." Petition at 11. This argument turns the principle of comity on its head; it also completely mischaracterizes the Court of Appeals' decision.

Even if the Court of Appeals had created the *per se* rule that Petitioner contends, such rule would still be far more consistent with comity principles than the rule advocated by Petitioner, which would allow United States courts simply to disregard the compulsory effect of foreign law on foreign nationals acting on foreign soil. Notably, the Court of Appeals expressly found that the District Court's order holding BIL in contempt for obeying the law of Luxembourg — the order that Reebok seeks to have reinstated — created a "conflict with the sovereignty of Luxembourg [that] could hardly be more sharp." App. at 61a.

In any event, contrary to Reebok's contention, the Court of Appeals did not create such a *per se* rule. In its opinion, the Ninth Circuit carefully evaluated the specific factual record before it which established that BIL did not do business in the State of California and did not otherwise have any minimum contacts with that State. The record also established that the Restraining Order had no legal force and effect in Luxembourg and that BIL was compelled by Luxembourg law, including the *Heatherdale* Order, to release the funds to McLaughlin. Far from creating any *per se* rule, the Ninth Circuit followed established precedent and held only that BIL could not be subject to personal jurisdiction in California based upon these specific facts. App. at 59a-61a.

B. The Court of Appeals' Decision Does Not Create Confusion and Uncertainty.

Unable to demonstrate that the Ninth Circuit's decision conflicts with any decisions of this Court or other Courts of Appeal, the Petitioner next argues that the Ninth Circuit confused the law by applying principles relating to the recognition of final judgments to provisional injunctions. Petition at 13-15. Thus, Reebok states that (1) the Ninth Circuit held that if an injunction is to have any effect beyond the United States as to a nonparty, it must be "registered" — that is, given formal legal recognition — in the country of the nonparty, and (2) an injunction is not "registerable" under Luxembourg law because it is not a final judgment. *Id.*

Reebok's first statement mischaracterizes the Ninth Circuit's decision. Its second statement mischaracterizes Luxembourg law.

The Ninth Circuit did not hold that an injunction must always be "registered" in a foreign country to have effect over

a nonparty there. As stated above, the Ninth Circuit merely held that it would be unfair to hold BIL subject to personal jurisdiction in California on the specific and unique facts of this case.

Moreover, the record below established that in this case the Restraining Order could have been given full legal effect in Luxembourg through the saisie-arret procedure. That procedure provided Reebok with an available and perfectly suitable mechanism to obtain a Luxembourg court order of attachment based upon the Restraining Order, thereby ensuring the continued restraint of the funds at BIL. Reebok never properly pursued this remedy. Ex.R. at 151-54.

The record below also established that the Restraining Order could have been given formal legal recognition as a Luxembourg court order through the exequatur procedure even though it was not a final judgment. Indeed, Mr. Jacques Loesch, BIL's Luxembourg law expert, testified that if Reebok had sought exequatur for the Restraining Order, it would have had a very good prospect of being granted. Ex.R. at 72, 146-47, 154. Inexplicably, Reebok never even pursued this remedy.[5]

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[5] Petitioner claims that Lorang, *Luxembourg* at 3-25, in INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS (D. Campbell ed. 1993) (the "Lorang Article") and Reebok's reconsideration motion in the District Court (C.R. 199) both stand for the propositions that exequatur requires a full civil trial on the merits and that only final judgments can receive the exequatur of a Luxembourg court. Petition at 5 n.5, 15 n.19. Petitioner is simply wrong. Neither of these citations, nor anything else in the record, stands for such propositions. In fact, the Lorang Article confirms that a Luxembourg court (i) may *not* evaluate the merits of foreign orders submitted to it for exequatur, and (ii) may give formal legal recognition to foreign provisional orders. Lorang Article at 3-7, 12, 16.

Thus, the Petitioner's criticism of the Ninth Circuit's decision has nothing to do with any perceived lack of available remedies in Luxembourg to give legal force to the Restraining Order. Rather, having failed properly to pursue those remedies, the Petitioner criticizes the Ninth Circuit for refusing to create a broad new rule of law holding that United States injunctions are binding upon nonparties wherever located in the world, irrespective of the absence of any contacts with the United States forum and irrespective of the existence of conflicting mandates under foreign law.

As the Ninth Circuit aptly stated, the power of a United States court simply does not extend that far:

> In fine, we do not agree that when a national of a foreign country follows the law of that country in that country it can be dragged halfway around the world to answer contempt charges arising out of a foreign court's ineffective order.
>
> . . . .
>
> . . . [T]here are limits to the district court's reach, and those limits became palpable when the court sought to extend its arm into the territory of another nation and to impose discordant duties upon the subjects of that nation whose actions were solely within its own borders.

App. at 59a-62a.

C. The Petitioner's "Parade of Horrors" Argument Is Without Merit.

The Petitioner also argues that in order to prevent a proliferation of money laundering by counterfeiters using foreign banks, this Court must now jettison well-settled principles of due process and comity and decree that United States injunctions bind the world. *See* Petition at 16-18. This argument requires little discussion.

The Petitioner has not shown — nor could it — that adherence to the due process and comity principles upon which the Court of Appeals' decision is founded will have a disastrous impact on criminal enforcement of United States counterfeiting laws. In fact, it is notable that Petitioner has never cited a single other case in which a party defendant such as McLaughlin has violated a United States injunction by withdrawing restrained funds from a foreign bank.

This is not surprising since other countries, like Luxembourg, typically have available procedures to give legal effect to a United States court order and to ensure the continued restraint of illegally laundered funds. Having failed properly to pursue the remedies available to it in Luxembourg, Petitioner's "parade of horrors" argument rings hollow.

In sum, the Petitioner has presented no reasons, much less the requisite "special and important reasons", Sup. Ct. R. 10.1, for this Court to review the decision of the Court of Appeals.

II.

THERE ARE ADDITIONAL REASONS FOR DENYING THE WRIT.

In addition to the Court of Appeals' dismissal on personal jurisdiction grounds, that Court's opinion provides several alternative bases which support dismissal of the contempt charge against BIL. For these reasons as well, review by this Court is unnecessary and unwarranted.

First, as the Court of Appeals made clear, the Restraining Order should never have been construed to require BIL to do anything in Luxembourg because that Order was never given legal force and effect in that country. App. at 55a, 59a-60a. Thus, as a matter of United States law, the Restraining Order could properly have been treated as a legal nullity by BIL, insufficient to require BIL to take, or refrain from taking, any action. *Id. Accord* Restatement (Third) of the Foreign Relations Law of the United States § 441 comment e (1987).

Second, even assuming the Restraining Order could be deemed to have had some legal force in Luxembourg, then the District Court should never have construed it to require BIL to perform acts in Luxembourg that would violate Luxembourg law. As the Ninth Circuit stated, "[i]t is a general principle that one state cannot require a person 'to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national,' nor can the person be required to refrain from an act that is required," *citing* Restatement (Third) of the Foreign Relations Law of the United States § 441(1)(a) (1987). App. at 55a. *Accord United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962). The Ninth Circuit correctly concluded that when the District Court held BIL in contempt for complying with Luxembourg law, it exceeded its power. App. at 59a.

Finally, the Ninth Circuit also correctly concluded that it would "defy logic" to hold BIL in contempt of the Restraining Order for complying with the *Heatherdale* Order. App. at 56a-57a. An essential element of Reebok's contempt claim against BIL under Fed. R. Civ. P. 65(d) was proof that BIL acted voluntarily when it transferred the funds. App. at 12a-14a. Because the compulsory effect of Luxembourg law removed any voluntariness with respect to BIL's transfers, Reebok could never satisfy the requisite elements of its contempt claim against BIL.

Accordingly, even if this Court were to disagree with the jurisdictional holding of the Ninth Circuit that Petitioner challenges, review of this case would still be unwarranted since the Ninth Circuit's opinion presents numerous alternative bases supporting dismissal of the contempt claim against BIL.

CONCLUSION

For all of the foregoing reasons, respondent Banque Internationale a Luxembourg S.A. respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LAWRENCE M. HARNETT
Counsel of Record

DIANE C. HERTZ
MARKS & MURASE L.L.P.
399 Park Avenue
New York, New York 10022
(212) 318-7700

Counsel for Respondent
Banque Internationale
a Luxembourg S.A.

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In The

Supreme Court of the United States

October Term, 1995

REEBOK INTERNATIONAL LTD. and
REEBOK INTERNATIONAL LIMITED,

Petitioners,

v.

BANQUE INTERNATIONALE A LUXEMBOURG, S.A.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN R. REESE*
REBECCA A. LENABURG
FRANK B. KENNAMER
McCUTCHEN, DOYLE, BROWN
& ENERSEN
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

Attorneys for Amicus Curiae International AntiCounterfeiting Coalition

*Counsel of Record

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MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF OF AMICUS CURIAE

The International AntiCounterfeiting Coalition ("IACC") respectfully moves this Court for leave to file out-of-time the IACC's amicus brief in support of the petition for writ of certiorari sought by Reebok International Ltd. and Reebok International Limited.

Petitioners consent to the filing of this brief. Respondent refused to consent, stating that the brief is untimely under Rule 37.2.

The brief is untimely and we beg the Court's indulgence. McCutchen, Doyle, Brown & Enersen, counsel for the IACC, were not engaged in this matter until August 9, 1995, and we were advised that an amicus brief would be due on August 28, 1995. Although the writ petition is dated July 17, 1995, so that respondent's brief in opposition ordinarily would be due on or about August 18, 1995, we were aware that respondent's time to file could be enlarged under Rule 15.2 in conjunction with Rule 30. It was only on August 23rd, upon trying to secure the necessary consent to file the attached brief, that we realized that our understanding of the due date was mistaken. The next day, August 24th, we sent our brief, and this motion, to be printed and lodged with the Court.

The delay is especially regrettable because the IACC's brief brings relevant and salient issues to the Court's attention, issues that are not addressed in the writ petition. The IACC's mission is the protection of intellectual property. As its name declares, however, the IACC approaches the Ninth Circuit's decision from an enforcement perspective that transcends the interests of the parties to this dispute. It views the Ninth Circuit's decision with particular alarm because the decision

erodes the effectiveness of the principal enforcement mechanism available to those, like the IACC's members, who must protect their patents, trademarks, copyrights, trade dress and trade secrets.

As explained in the brief, the Ninth Circuit's decision unnecessarily restricts the reach not only of the Lanham Act, but also of the district court's injunctive power. Moreover, the Ninth Circuit reached its result by a process that is itself unsound, confusing and in conflict with other courts of appeals' decisions as well as a host of settled rules and principles. The attached brief explains and demonstrates the conflicts and the confusion engendered by the Ninth Circuit's decision.

Accordingly, the IACC requests that the Court not summarily reject the filing of the attached brief because of the inadvertence of the IACC's counsel, and that it accept the brief and consider it on the important issues presented by the petition for certiorari.

Respectfully submitted,

JOHN R. REESE*
REBECCA A. LENABURG
FRANK B. KENNAMER
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

Attorneys for Amicus Curiae The International AntiCounterfeiting Coalition

*Counsel of Record

August 28, 1995

No. 95-85

In The

Supreme Court of the United States

October Term, 1995

REEBOK INTERNATIONAL LTD. and
REEBOK INTERNATIONAL LIMITED,

Petitioners,

v.

BANQUE INTERNATIONALE A LUXEMBOURG, S.A.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Amicus curiae The International AntiCounterfeiting Coalition ("IACC") respectfully submits this brief in support of the petition for writ of certiorari (the "petition") submitted by Reebok International Limited and Reebok International Ltd. (collectively "Reebok"). The petition raises important and timely questions of the reach and effect of a federal court's injunctive power. The Ninth Circuit's decision unduly restricts this power, conflicts with principles applied by other circuits, and creates confusion in an area that now more than ever requires clarity. Accordingly, the IACC joins Reebok in asking the Court to review the Ninth Circuit's decision.

I. STATEMENT OF AMICUS CURIAE

The IACC is an organization founded to promote the protection of intellectual property on a worldwide basis through the use of legislation, law enforcement and preventive actions. This protection extends to patents, trademarks, copyrights, trade dress and trade secrets. The IACC's members include manufacturers, associations, product security companies, investigators and attorneys.[1]

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[1] Amicus's members include companies with technology and intellectual property related trade secrets. Amicus confines its support to Reebok's position that a district court has personal jurisdiction over nonparty "aiders and abettors" to punish them for violating an injunction when the contumacious acts occur outside the United States. No member by joining in and concurring with this brief waives any right or any position it may take or has taken with respect to any past or future issue or litigation, or makes any representation of agreement or disagreement with the position of any other member concerning any other issue or litigation. The position of each member is

The touchstone of the IACC's mission is to combat counterfeiting and piracy by promoting laws, regulations and directives designed to render theft of intellectual property undesirable and unprofitable. It also provides information and training in counterfeit product identification and in the methods of product security to prevent successful abuse of its members' intellectual property rights. Critical to the IACC's purpose is the belief of its members that acts of counterfeiting and piracy can and do cause severe health risks, safety hazards and economic harm. The IACC both initiates actions and supports government actions that will lead to the prosecution of intellectual property infringers.

II. THE NINTH CIRCUIT'S DECISION IS A BOON TO COUNTERFEITERS BECAUSE IT EVISCERATES THE DISTRICT COURTS' POWER TO ENFORCE THEIR INJUNCTIONS AGAINST NONPARTY AIDERS AND ABETTORS

The Ninth Circuit's decision is bad law, but undoubtedly good news for wrongdoers, particularly international counterfeiters. It subverts the injunctive reach of the district courts over nonparty aiders and abettors and creates a virtual road map for counterfeiters to place their unlawful gains beyond the reach of the courts. Defendant Byron McLaughlin ("McLaughlin") may be subject to contempt, but that was no impediment to wrongly obtaining his millions. This leaves Reebok to bear both the loss and

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limited to the facts and issues set forth in this brief, and no member by joining in and concurring with this brief takes any position on any issue in this petition which is not addressed herein.

the nearly insurmountable task of attempting to recover them from a defendant who has fled the United States and hidden his ill-gotten gains. Meanwhile Banque Internationale a Luxembourg ("BIL"), which was served and which acknowledged the injunction in the United States at its New York office, but nevertheless defied the court's order by doing "everything it could to ensure that McLaughlin was able to remove his funds from the bank" (App. 31a), cries foul at being called to account for its contempt. And the Ninth Circuit obliges it. In doing so, this case has been elevated from a private dispute between one intellectual property owner and its latest intentional infringer, to a decision which, as discussed below, implicates principles that affect all intellectual property owners' ability to combat piracy. This is no small problem.

Product counterfeiting is a huge national and international problem.[2] The quantity, quality and value of counterfeited goods increases each year as globalized markets facilitate the movement of goods both legitimate and counterfeit.[3] The money that follows and flows from

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[2] *See, e.g.*, 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25.01[5][a] (3rd ed. 1992) ("[C]ounterfeiting is not confined to 'luxury' items and is widespread as to a wide range of health and safety related items such as drugs, fertilizers, chemicals, computer components, and auto and aircraft parts. . . . Counterfeiting is a worldwide phenomenon."); The World Intellectual Property Organization (WIPO), *Background Reading Material On Intellectual Property*, 176 (1988) ("The pirating of trademarked products through commercial counterfeiting has reached epidemic proportions in recent years.").

[3] *See* John Bliss, *Counterfeiting In The Information Age: A Global Threat To Intellectual Property Protection*, Legal

counterfeited goods circulates electronically around the world. Offshore banks, in places like Luxembourg, are the repositories of choice for those who would break and evade federal laws such as the Lanham Act. Congress recognized these problems and the harm caused by counterfeiting by including in the Lanham Act procedures specially designed to combat them. *See* 15 U.S.C. § 1116(d) (seizure provisions). If defendants can enlist the assistance of third party banks to avoid injunctions granted to freeze their ill-gotten assets, Congress' remedies will be frustrated and little will be done to "take all economic incentive out of trademark infringement" as the Ninth Circuit itself has previously directed. *Playboy Enterprises, Inc. v. Baccarat Clothing Co., Inc.*, 692 F.2d 1272, 1275 (9th Cir. 1982).[4]

Backgrounder (Washington Legal Foundation, Washington D.C.), August 12, 1994, at 4 ("[T]he new Information Age and its associated technologies present not only opportunities but also a growing threat. . . . [T]he digitization of information permits the perfect copying of information – from computer programs, books, CDs, laser disks and video cassettes to apparel."). *See also Fact Sheet*, The IACC Update (The International AntiCounterfeiting Coalition, Inc., Washington D.C.) 1995 ("Between 1982 and 1988, world trade nearly doubled, growing from $3 trillion to over $5 trillion. But U.S. trade revenue losses due to piracy increased 1,100%, from $5.5 billion to $61 billion during that same period. Currently, the IACC estimates the economic cost due to product counterfeiting to exceed $200 billion each year.")

[4] "[L]uxembourg banking deposits are among the highest in the offshore world. Only Switzerland . . . and the Cayman Islands . . . outstrip Luxembourg." *Investors Chronicle*, June 24, 1994, *available in* Westlaw, 1994 WL 8377720. In discussing the failure of the Bank of Credit and Commerce International ("BCCI"), a bank incorporated in Luxembourg, the Senate Foreign Relations Subcommittee on Terrorism, Narcotics and

Given the increase in counterfeiting activity worldwide, and the growing sophistication of counterfeiters in their use of foreign bank accounts to store, launder and secrete their gains, the district courts need the full constitutional scope of their contempt power to prevent and remedy the wrongdoing. The Ninth Circuit's decision hamstrings that power.

Moreover, the Ninth Circuit reaches this bad result by a process that is itself unsound, confusing and in conflict with other courts of appeals' decisions. The court effectively holds that an injunction is not enforceable by contempt if the acts that violate it are done in a jurisdiction whose law conflicts with the injunction. That broad holding cannot be squared with numerous other courts of appeals cases that have recognized that United States decrees – both judicial and legislative – can apply to conduct in a foreign country, and that comity is not blind deference to foreign law and foreign courts. By failing to

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International Operations issued a report in 1992 which found that bank secrecy laws still prevent an adequate flow of information to help regulators track banks' international operations, that too many offshore banking havens exist in the Grand Caymans, the Bahamas, and the Channel Islands, among others, and that lax regulation in jurisdictions like Luxembourg contribute to the ability of banks like BCCI to perpetrate fraud and manipulation. *Thomson's International Banking Regulator*, October 12, 1992, *available in* LEXIS, Nexis Library, File ARCNWS. *See also California Bankers Ass'n v. Shultz*, 416 U.S. 21, 27 (1974) (recognizing concern about "serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic, criminal, tax and regulatory enactments.").

limit comity to its proper role, the Ninth Circuit decision creates confusion and uncertainty that serves no end but to aid wrongdoers.

Indeed, the decision is even more problematic. Given the Ninth Circuit's preoccupation with whether the injunction was "registered" in Luxembourg, and whether the release of funds was permitted or required by Luxembourg law, McLaughlin himself could have avoided contempt sanctions by claiming to be under conflicting commands from two tribunals despite the court's finding by clear and convincing evidence that he had knowingly violated the injunction. In other words, the Ninth Circuit's decision appears to create a right not to comply with an injunction regardless of jurisdiction. That result is obviously wrong and unacceptable. That in itself requires this Court's attention.

There is more. The Ninth Circuit's decision conflicts with a host of other settled rules and principles:

First, it undermines the force of Rule 65, which specifically makes a federal court injunction binding on nonparties "in active concert or participation" with the defendant. The Ninth Circuit's refusal to give effect to this provision directly conflicts with the Fifth Circuit's decision in *Waffenschmidt v. Mackay*, 763 F.2d 711 (5th Cir. 1985), *cert. denied sub nom. Currey v. Waffenschmidt*, 474 U.S. 1056 (1986). This Court should resolve the conflict.

Second, the decision imposes an impossible and unnecessary condition on the vitality of injunctive power – that an injunction need not be honored unless it is "registered" wherever defendants and their aiders and abettors choose to act. This holding conflicts with the

Second Circuit's decision in *Stiller v. Hardman*, 324 F.2d 626 (2d Cir. 1963). The Ninth Circuit's approach is not the law in the United States and it should not be the law when applied to Luxembourg or any other foreign country. If it is to be the law when applied outside the United States, this Court should say so and, again, provide a coherent rationale.

Third, the decision gives less force to judicial injunctions than to legislative enactments without explanation. Congress has the power to reach acts done in foreign countries by foreign nationals that have substantial effects in the United States. Many cases say so. A court's power to enforce its own injunction should be subject to the same analysis. If not, a coherent explanation from this Court is needed.

Finally, the decision fails properly to apply the principle of comity, by ignoring the balancing test that has been consistently applied in similar cases. *E.g., In re Grand Jury Proceedings (United States v. Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983). Instead, the Ninth Circuit simply put its thumb on the scale and held that deference to foreign law outweighs all. The Court should grant the petition to eliminate the conflict and to reaffirm the principles that govern such cases.

Clear signposts are needed to instruct lower federal courts as to the permissible scope and reach of injunctive decrees under Rule 65(d). The Court should grant Reebok's petition.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. Cases Enforcing Injunctions Outside The United States

This Court and other courts of appeals have squarely held that a district court may enjoin activities in a foreign country. *See, e.g., United States v. First National City Bank,* 379 U.S. 378, 384 (1965) ("district court has the authority to order [party before it] to 'freeze property' under its control, whether the property be within or without the United States"); *United States v. Davis,* 767 F.2d 1025, 1038 (2d Cir. 1985) ("well-settled that a federal court has the power to enjoin a party before it from pursuing litigation before a foreign tribunal"); *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia), supra,* 691 F.2d 1384 (affirming contempt order against Canadian bank for failure to produce documents at its Bahamas branch notwithstanding that compliance would require the bank to violate Bahamian law).

On its face, the Ninth Circuit's decision is in direct conflict with these holdings. The court's attempt to distinguish the *Bank of Nova Scotia* cases as "concerning the failure of a foreign bank with United States branches to comply with a federal district court's orders" (App. 53a, n.5) is simply wrong. BIL, too, has a United States office (App. 2a), a fact that the Ninth Circuit inexplicably ignores.[5]

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[5] BIL obviously conducts business in New York, otherwise what reason could there be for its office? Even if, as the Ninth

Moreover, under the Ninth Circuit's analysis, the presence or absence of a United States branch is irrelevant. If, as the court holds, a conflicting foreign law or order is sufficient by itself to allow BIL to avoid compliance with a United States injunction, what difference does it make that it has a branch in the United States? Certainly, the Ninth Circuit's decision does not explain it.

B. Cases Enforcing Injunctions Against Nonparties Outside The District Court's Territorial Jurisdiction

Rule 65(d) of the Federal Rules of Civil Procedure makes an injunction binding "upon those persons in active concert or participation with" the defendant – that is, nonparty aiders and abettors over whom the court has not acquired personal jurisdiction. If a court had personal jurisdiction over potential aiders and abettors, it could bind them directly; Rule 65(d) would be superfluous.

Circuit assumes, an injunction has only nationwide scope, BIL is present in the United States. Indeed it advertises that presence (CR 192), and its New York office was served with the injunction. *See Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604, 619 (1990) (Valid predicate for personal jurisdiction is that defendant was personally served while present in the forum state). *Burnham* suggests that the Ninth Circuit was wrong in reviewing the assertion of personal jurisdiction over BIL solely as a question of contacts (App. 52a), because "jurisdiction based on physical presence alone constitutes due process. . . . " 495 U.S. at 619. If BIL's presence, advertising and knowledge of service of the injunction are not enough to bind it (or do not bind it), how is one to know how to enforce an injunction?

The Fifth Circuit recognized the effect of Rule 65(d) in *Waffenschmidt v. Mackay, supra,* 763 F.2d 711. Specifically, the court held that nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court's contempt power if, with actual notice of the court's order, they actively aid and abet a party in violating it. *Id.* at 714. The court explained that the district court had "inherent authority to enforce its own injunctive decrees," *Id.* at 716, and that Rule 65(d) "could easily be thwarted if a court could only enforce its injunctions over nonparty aiders and abettors who resided within the court's territory." *Id.* at 717. Moreover, the contemnors' conduct with respect to the court's order was itself sufficient to confer personal jurisdiction under the traditional "minimum contacts" standard: they dissipated assets outside the forum knowing they were subject to marshaling within the forum, and therefore they could foresee being haled into court in the forum. *Id.* at 723.[6]

That is so here. In addition to BIL's advertised presence in the United States, BIL was personally served with the injunction both at its New York office and its office in Luxembourg. It knew that McLaughlin's assets were restrained, yet it "assisted McLaughlin in creating and

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[6] The Second Circuit has articulated a similar position. In *United States v. Paccione,* 964 F.2d 1269 (2d Cir. 1992), the court held that a nonparty was subject to a contempt order for violating a restraining order of which he had notice. In *Paccione,* as here, the nonparty had "interfered with the *res,* the disposition of which the district court had specifically restricted." *Id.* at 1275. The court noted that it had the power to bind nonparties to the terms of an injunction "to preserve its ability to render a judgment in a case over which it has jurisdiction." *Ibid.*

devising a scheme that would allow McLaughlin to get around the court order" (App. 28a) and did "everything it could to ensure that McLaughlin was able to remove his funds from the bank." (App. 31a) McLaughlin's actions are a paradigm of how a defendant can enlist the aid of cooperative nonparties like BIL to frustrate a district court's order. By finding a bank in a jurisdiction that will not honor a United States court injunction, counterfeiters can protect and keep their ill-gotten gains. BIL's actions exemplify the very reason for Rule 65(d).

The decision below cannot be squared with *Waffenschmidt*. The court tried to explain away the apparent conflict by saying that *Waffenschmidt* turned on the " 'simple fact that the mandate of a injunction issued by a federal district court runs nationwide.' " (App. 54a) But the same is true here. BIL was served with the nationwide order in New York.

The difference, if any, is that the only tangible evidence of BIL's acts assisting McLaughlin to defy the injunction occurred outside the United States, in Luxembourg. This difference is not dispositive. In fact, the Ninth Circuit has confused the fact of a violation with its location, and treated an intangible account in a multinational bank as if it were tangible property with a fixed location in Luxembourg. This is plain analytical error. *See Leman v. Krentzler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932) ("the contempt lay in the fact, not in the place of the disobedience to the requirement"); *Stiller v. Hardman, supra*, 324 F.2d at 628 ("[v]iolation of an injunctive order is cognizable in the court which issued the injunction

regardless of where the violation occurred"). By emphasizing the place of the violation, the court simply ignores the fact that it occurred. Indeed, the court makes the place of the violation dispositive of whether it occurred at all. This upside down approach begs the question and is clearly wrong.

The conflict between the Ninth Circuit's decision and *Waffenschmidt* presents an important question on the enforcement of district court injunctions. This Court should review the question and resolve the conflict.

C. Cases Holding That Injunctions Are Enforceable Without Registration

The Ninth Circuit's preoccupation with the place of the violation led it to another error that conflicts with established law. The court holds that BIL was not bound to respect the injunction because it was not registered in Luxembourg. But an injunction cannot be registered in Luxembourg.[7] Thus, under the Ninth Circuit's analysis, the prospect of binding BIL, despite its notice of the terms of the injunction, despite its office in New York, and despite its obvious assistance of McLaughlin, was illusory.

The Ninth Circuit's approach is legally wrong, as well as unrealistic. An injunction need not be registered to bind nonparties. As the Second Circuit held in *Stiller v. Hardman, supra*:

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[7] The Ninth Circuit knew the injunction was not enforceable under Luxembourg procedure. (App. 56a)

> Violation of an injunctive order is cognizable in the court which issued the injunction, regardless of where the violation occurred . . . . [T]he Ohio district court had power to punish a violative infringement though the infringement took place in New York. There is therefore no such need for registration of injunctive orders as there is for registration of money judgments.

324 F.2d at 628. *See also Waffenschmidt, supra,* 763 F.2d at 721.

Again the Ninth Circuit's decision is in square conflict with the decision of another court of appeal, and again the Ninth Circuit got it wrong. Since an injunction need not be registered in the United States, there is no reason to make it the *sine qua non* of injunctive vitality in a foreign country.[8]

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[8] Although the Ninth Circuit ultimately expresses its conclusion in terms of lack of personal jurisdiction over BIL (App. 50a, 61a), its actual analysis makes personal jurisdiction irrelevant. The factors upon which the Ninth Circuit relied to find that BIL was not obliged to abide by the injunction – failure to register and a conflicting command from a foreign court – would exist independently of personal jurisdiction. Thus, under the Ninth Circuit's analysis, BIL was either free to disregard the injunction despite the existence of personal jurisdiction or bound to obey it despite its supposed infirmity in Luxembourg. If BIL were free to disregard the injunction, then personal jurisdiction is irrelevant. If BIL were bound to obey it, then the lack of registration and the conflicting command of the Luxembourg court cannot be relevant in determining whether the district court had the power to enforce its injunction. These considerations come into play, rather, when the court determines whether it should, consistent with principles of comity, enforce the violation of its injunction through a contempt order. *See* Section E, below.

D. Cases Recognizing The Extraterritorial Effect Of Legislative Decrees

Congress has long exercised the power to prescribe rules of law concerning conduct outside the United States that has or is intended to have a substantial effect within the United States. Many decisions of this Court have explicitly recognized this power. (Pet. 12, n.13) Indeed, the statute on which the underlying case here is based, the Lanham Act, applies to acts in a foreign country, as the Ninth Circuit itself recognized. (App. 51a, citing *Reebok Int'l, Ltd. v. Marnatech Enters.*, 970 F.2d 552, 554-57 (9th Cir. 1992))

A judicial decree can also be an exercise of prescriptive jurisdiction. For example:

> Antitrust enforcement often involves not only findings of violation and assessment of damages, but also judicial decrees prescribing or enjoining future conduct. . . . Though such orders are issued by courts in exercise of equity powers, they are in a real sense a second exercise of jurisdiction to prescribe. For purposes of international law they are subject to the same constraints and require the same evaluations under §§ 402 and 403 as the initial determination by Congress to apply United States law.

Restatement (Third) of the Foreign Relations Law of the United States § 415, Comment h (1987).

The same is true of the district court's injunction in this case, yet the Ninth Circuit does not discuss the matter. Thus, while the underlying legislative proscription applies outside the United States, the Ninth Circuit holds that the judicial power to remedy violations does

not. The result is an unwarranted curtailment of judicial power, and the creation of an arbitrary, unexplained distinction between legislative and judicial power.[9] There is no principled basis for this distinction. The point is obviously important, and this Court should grant certiorari to address it.

E. Cases Following The Proper Analysis of Comity Principles

The Ninth Circuit made the existence of conflicting foreign law dispositive. In effect, Luxembourg law was a *per se* defense to the charge of contempt for deliberately aiding and abetting violations of a United States district court injunction. The Ninth Circuit's *per se* approach is inconsistent with the proper, and previously settled, approach to resolving issues implicating interests of foreign states.

Rule 65(d) ensures that a party "may not nullify a decree by carrying out prohibited acts through aiders and abettors." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1965). This power, in turn, is not nullified, though it may be restrained, because the activities occur in a foreign country and ostensibly under command of foreign law. The Eleventh Circuit, for example, has held that a district

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[9] This sends entirely the wrong signal. The United States in recent years has been heavily involved in seeking cooperation abroad with its intellectual property laws. The Ninth Circuit's decision effectively undermines this process. On the one hand, the government is telling countries that they will be subject to economic sanctions if they do not comply; on the other hand, the Ninth Circuit is telling them that their laws are paramount.

court may properly compel a Canadian bank to produce documents located at the bank's Bahamas branch even when compliance would subject the bank to criminal sanctions in the Bahamas. *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia), supra,* 691 F.2d 1384. *See also In re Grand Jury Proceedings (United States v. Bank of Nova Scotia),* 740 F.2d 817 (11th Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985). In the earlier of these cases, the Eleventh Circuit first analyzed whether the district court had the power, consistent with due process, to compel the bank to violate the law of a foreign sovereign. 691 F.2d at 1389. Once satisfied that such power existed, the court then weighed the applicable (Restatement) factors in deciding whether the principle of comity required that enforcement be denied. 691 F.2d at 1389-1391; 740 F.2d at 826-829. In both cases, the court concluded that the principle of comity did not preclude enforcement of the subpoenas. 691 F.2d at 1391; 740 F.2d at 829.

Obviously, the result in those cases conflicts with the result in this case. Equally important as the conflict in results, however, is the conflict in the way the results were reached. The Eleventh Circuit conducted a proper analysis; the Ninth Circuit did not.

Whether the Luxembourg court's order (or the lack of registration) counseled against enforcement of the injunction required such analysis. Since the district court's injunctive decree was a proper exercise of its jurisdiction to prescribe, it was entitled to "employ judicial . . . measures to . . . punish noncompliance"[10] when

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[10] *Restatement (Third) of the Foreign Relations Law of the United States,* § 431(1) (1987).

BIL "carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state,"[11] *i.e.*, when it knowingly assisted in the violation of the injunction. At this point, the principle of comity would be decisive in deciding whether to punish BIL's violation. The Ninth Circuit missed this analytical step.

The limitations now set forth in § 403 of the Restatement (Third) form the basis of a balancing test that the Ninth Circuit itself has employed in similar cases. *See, e.g., United States v. Vetco*, 691 F.2d 1281 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981). In *Vetco*, the Ninth Circuit held that a district court could enforce through contempt and sanctions a summons issued by the Internal Revenue Service to obtain records of Swiss subsidiaries of Vetco, an American firm. Vetco argued it should be excused from compliance because it would result in criminal liability in Switzerland. The court, in balancing the Restatement factors to determine "whether foreign illegality ought to preclude enforcement" of the summons, held that the interest of the United States in enforcement outweighed the contrary Swiss interest. *Id. at* 1291.

The Ninth Circuit should have applied that same test here. Instead, it blindly deferred to Luxembourg law without balancing the relevant factors. The *Bank of Nova Scotia* cases and *Vetco* suggest that the Ninth Circuit deferred to an unreasonable and inappropriate degree.

The Court should grant Reebok's petition to clarify the analysis and to reaffirm the principle that a conflict of

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[11] *Restatement (Third) of the Foreign Relations Law of the United States* § 421(2)(j) (1987).

laws is not an absolute bar to a court's exercise of its power.

IV. CONCLUSION

The Ninth Circuit's decision conflicts in several substantial ways with decisions of this Court and other courts of appeals. The issues are of vital importance to the lower courts' ability effectively to enforce their own injunctions. That power is in turn vital to remedying and preventing the use of off-shore banks as safe havens for counterfeiters. Reebok's petition should be granted.

Respectfully submitted,

JOHN R. REESE*
REBECCA A. LENABURG
FRANK B. KENNAMER
McCUTCHEN, DOYLE, BROWN
& ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone (415) 393-2000

Attorneys for Amicus Curiae International AntiCounterfeiting Coalition

*Counsel of Record

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In The

Supreme Court of the United States

October Term, 1995

REEBOK INTERNATIONAL LTD. and
REEBOK INTERNATIONAL LIMITED

Petitioners,

v.

BANQUE INTERNATIONALE
A LUXEMBOURG S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE OF BANQUE INTERNATIONALE A LUXEMBOURG S.A. IN OPPOSITION TO MOTION OF AMICUS CURIAE FOR LEAVE TO FILE OUT-OF-TIME BRIEF

LAWRENCE M. HARNETT
Counsel of Record

DIANE C. HERTZ
MARKS & MURASE L.L.P.
399 Park Avenue
New York, New York 10022
(212) 318-7700

Counsel for Respondent
Banque Internationale
a Luxembourg S.A.

7271
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

6 pp

RESPONSE OF BANQUE INTERNATIONALE A LUXEMBOURG S.A. IN OPPOSITION TO MOTION OF AMICUS CURIAE FOR LEAVE TO FILE OUT-OF-TIME BRIEF

The Respondent, Banque Internationale a Luxembourg S.A. ("BIL"), respectfully submits this Response in Opposition to the Motion for Leave to File Out-of-Time Brief (the "Motion") of Amicus Curiae International AntiCounterfeiting Coalition (the "IACC"). As demonstrated below, the IACC's Motion and the brief submitted therewith are untimely pursuant to Sup. Ct. R. 37.2. As such, the Motion should be denied and the brief should be given no consideration by the Court.

ARGUMENT

Rule 37.2 of the Supreme Court Rules governs the filing of *amicus curiae* briefs on a petition for writ of certiorari and provides in pertinent part:

> A brief of an *amicus curiae* submitted prior to the consideration of a petition for a writ of certiorari or a jurisdictional statement, accompanied by the written consent of all parties, **may be filed only if submitted within the time allowed for filing a brief in opposition to the petition for a writ of certiorari** or for filing a motion to dismiss or affirm. A motion for leave to file a brief *amicus curiae* when consent has been refused is not favored. **Any such motion must be filed within the time allowed for the filing of the brief *amicus curiae*. . . .**

Sup. Ct. R. 37.2 (emphasis added).

This rule is mandatory in nature — an untimely *amicus curiae* brief or motion for leave to file same will not be considered by the Court. *See, e.g.*, J. Moore, 13 *Moore's Federal Practice* ¶ 837.11 at SC37-11 (1995) (providing that "timeliness on the part of the amicus in filing the brief is very important" and that any motion for leave to file an *amicus* brief "must be filed within the [Rule 37.2] time periods for filing of the brief.").

The Motion by the IACC in the instant case is untimely. The IACC first requested BIL's consent to the filing of an *amicus* brief on August 23, 1995 — five days after the August 18, 1995 due date for BIL's submission of its Brief in Opposition to the Petition for Writ of Certiorari filed by Reebok.[1] In light of the fact that any *amicus* brief or motion for leave to file same would already have been untimely, BIL's counsel advised the IACC's counsel by letter dated August 24, 1995 that BIL would not consent to the IACC's submission of an *amicus* brief. Thereafter, by Motion dated August 28, 1995, the IACC sought leave to file an untimely *amicus* brief.

The IACC has conceded that its Motion is untimely, but has requested that it be excepted from the timeliness requirement of Sup. Ct. R. 37.2 on the basis that its brief raises important issues that the Court should consider. IACC Motion at 1-2. Rule 37.2 provides for no such exception. Accordingly, the IACC's Motion for leave to file an untimely brief should be denied and the brief should not be considered by the Court.

In any event, the simple fact is that the IACC's brief does *not* raise any issues of importance for this Court. While the IACC's brief boldly proclaims that the decision of the Ninth Circuit will

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[1] The definitions and abbreviations used in BIL's Brief in Opposition to Reebok's Petition for Writ of Certiorari ("BIL Brief") will also be used herein. BIL's List of Interested Parties is included in BIL's Brief at ii-iii.

be a boon for counterfeiters (IACC Brief at 2-5), it fails to present any support for this statement. Indeed, the IACC has not cited a single other case in which a plaintiff has failed to prevent a defendant such as McLaughlin from violating a United States injunction by withdrawing restrained funds from a foreign bank where, as here, the plaintiff had prior knowledge of the identity of the foreign bank. This omission is not surprising since other countries, like Luxembourg in this case, typically have available procedures that allow a plaintiff to obtain legal effect for a United States court order and thereby ensure the continued restraint of illegally laundered funds. *See* BIL Brief at 16-17. The IACC's "boon to counterfeiters" argument ignores reality.

Moreover, the IACC's brief raises no issues of importance because it is built upon a complete misunderstanding of the factual record below. Thus, the IACC liberally sprinkles its brief with findings adverse to BIL made by the District Court, *all* of which were based upon the District Court's clearly erroneous conclusion that the *Heatherdale* court in Luxembourg had not been apprised of the Restraining Order when it ordered BIL to release the funds. *See* IACC Brief at 3, 10, 11. In fact, as the Court of Appeals correctly concluded, "[t]he Heatherdale Order was issued with full knowledge of both the TRO and its ineffectiveness under Luxembourg law." App. at 59a.

Finally, the IACC brief raises no issues of importance because it reflects a fundamental misunderstanding of the Ninth Circuit's decision. The IACC complains that the Ninth Circuit did not perform the balancing test required when applying a United States judicial decree extraterritorially. IACC Brief at 15-18. In fact, however, the Ninth Circuit conducted an exhaustive balancing test, weighing the various factors in favor of and against the exercise of jurisdiction over BIL in this case. App. at 59a-61a. In light of the specific factual record which

established, *inter alia*, that BIL had no presence in the forum, that all relevant conduct took place in Luxembourg and that BIL was compelled by Luxembourg law, including the *Heatherdale* Order, to release the funds to McLaughlin, the Ninth Circuit ultimately concluded:

> Thus, *on balance*, fairness . . . dictates that personal jurisdiction must fail in this case.

App. at 61a (emphasis added).[2]

The IACC's real complaint is that the Ninth Circuit conducted a balancing test at all. According to the IACC, the location of BIL's conduct was irrelevant and, therefore, the Ninth Circuit should have disregarded the fact that BIL was a foreign national located on foreign soil acting under compulsion of foreign law, and simply decreed a *per se* rule that the Restraining Order was binding upon BIL because United States injunctions bind the world. *See* IACC Brief at 11-13. Needless to say, the IACC has presented no good reason for this Court to create such an expansive rule of law and thereby disregard the well-settled principles of comity and due process that guided the Ninth Circuit in reaching its decision.[3]

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[2] The IACC attempts to make much of the fact that BIL maintains a small representative office in New York. IACC Brief at 8 n.5, 11. However, the record below confirmed that BIL's New York representative office had absolutely no involvement in the relevant events and, in fact, is strictly prohibited under New York banking laws from engaging in any banking business whatsoever. Ex.R. at 64. Based upon this factual record, both the District Court and the Court of Appeals recognized that BIL does not do business anywhere in the United States. App. at 21a, 47a, 53a. Upon weighing all of the facts of this case, the Court of Appeals correctly determined that BIL could not be subject to jurisdiction.

[3] In an effort to suggest that the Ninth Circuit's decision conflicts with decisions of this Court and other Courts of Appeal, the IACC has effectively

(Cont'd)

CONCLUSION

The IACC's brief is untimely and raises no issues of importance warranting consideration by this Court. BIL respectfully submits that the Motion for Leave to File Out-of-Time Brief should be denied.

Dated: September 8, 1995

Respectfully submitted,

LAWRENCE M. HARNETT
Counsel of Record

DIANE C. HERTZ
MARKS & MURASE L.L.P.
399 Park Avenue
New York, New York 10022
(212) 318-7700

Counsel for Respondent
Banque Internationale
a Luxembourg S.A.

(Cont'd)
adopted the same arguments advanced by Reebok in its Petition. *See* IACC Brief at 8-17. Just as with Reebok's showing, all of the cases cited by the IACC are distinguishable from this case and do not even remotely conflict with the Ninth Circuit's decision. *See* BIL Brief at 12-16.